Supreme Court, U.S.
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(3)

CASE NUMBER 94-1585
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

LEON KANOIVICKI and
MAURICIO KANOIVICKI,

Petitioners,

v.

BETTYE JEAN GREEN, et al.,

Respondents.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE CIRCUIT COURT
FOR THE FOURTEENTH JUDICIAL DISTRICT
OF TENNESSEE, AT MANCHESTER,
PART II

NO. 24,954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

Defendant-Contestant,

AND

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

ORDER

In this cause the pleadings reflect that with the exception of the Main

Street Church of Christ no other beneficiary made an appearance after being duly served with the Summary Judgment Motion of the proponents of the Dave King Wills dated January 18, 1985 and April 8, 1985. The pleadings filed by the Main Street Church of Christ by their counsel in response to the Motion for Summary Judgment rely on the proof tendered by the proponent of the holographic will, Carolyn Higdon. No additional proof has been tendered at any stage of this proceeding by the Main Street Church of Christ in any form whether affidavits, deposition or sworn testimony and counsel for Main Street Church of Christ stated in open Court that it was the church's position that the holograph will was valid and relied upon the proof introduced by Carolyn Higdon, defendant-contestant.

Taking the entire record introduced by the proponent of the holographic will, Carolyn Higdon, and viewed by the Court from the standpoint of being introduced on behalf of the potential beneficiary, Main Street Church of Christ, the proof appears to be insufficient to present the issue to a jury. The record from prior hearings in federal proceedings is clear that the January 18, 1985 and April 8, 1985 wills were executed after the holographic will and there is no proof to the contrary in the present proceeding and no proof that David King lacked testamentary capacity at least at the time the January 18, 1985 will was executed. The Court is of the opinion that this is a fact question and the Court finds that no proof has been presented by the Main Street Church of Christ that would support its position

that the holographic will was the Last Will and Testament of Dave King and therefore the Court respectfully rules there is no issue to present to a jury.

The Motion for Summary Judgment filed on behalf of Plaintiff/Proponents, Betty Jean Green et al is sustained as to the Main Street Church of Christ.

IT IS SO ORDERED.

ENTER this the 1st day of June, 1992.

s/John W. Rollins
CIRCUIT JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
COFFEE CIRCUIT

NO. 01-A-01-9209-CV-00369

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON and THE MAIN
STREET CHURCH OF CHRIST,

Defendants-Appellants.

O R D E R

Upon consideration of the applications for permission to appeal and the entire record in this cause, the Court is of the opinion that the both applications should be denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
COFFEE CIRCUIT

NO. 01A01-9209-CV-00369

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON and THE MAIN
STREET CHURCH OF CHRIST,

Defendants-Appellants.

ORDER ON PETITIONS TO INTERVENE
AND TO REHEAR

On 6 December 1993 this Court denied T.R.A.P. applications submitted by the two (2) defendants.

On 7 December 1993, two (2) non-parties, Leon Kanoivicki and Mauricio Kanoivicki, filed a motion to intervene.

On 12 December 1993 the same non-parties filed a petition to rehear denial of the T.R.A.P. 11 applications.

Upon consideration the Court concludes that the Motion to intervene was untimely and therefore must be denied.

There is no provision in the Rules of Appellate Procedure for rehearing of denial of a T.R.A.P. 11 application for permission to appeal, therefore the petition to rehear must be denied.

Enter this 14th day of February, 1994.

PER CURIAM

IN THE CHANCERY COURT FOR
COFFEE COUNTY, TENNESSEE
PROBATE DIVISION

NO. 90-87

IN RE:

ESTATE OF DAVE KING,

Deceased.

NOTICE OF CONTEST

The undersigned counsel for Martin King, Betty Jean Green, Deborah Lapidus Fisher, Lisa Lapidus Cohen, and Barry Lapidus ("King Petitioners"), hereby give notice that they contest the validity of the undated document, submitted on behalf of Carolyn Higdon in this matter, as the last will of Dave King. These contestants submit that they have filed simultaneously herewith a Petition for Probate in Solemn Form, containing the document or documents which are the last will of David King, deceased, and that

these proceedings should be consolidated with the Petitioners' Petition for Probate in Solemn Form so that the entire matter can be certified to the Circuit Court for a will contest, in accordance with T.C.A. §§32-4-101 et seq. Petitioners will designate the issues in the will contest proceedings at the appropriate time or as directed by the Court.

Contestants request that the Court enter an order in this cause holding that the purported order entered by the Clerk & Master in this matter is null and void and of no effect, and that the grant of letters testamentary to Carolyn Higdon is also null and void and of no effect, all pursuant to T.C.A. §16-16-201(b).

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Attorneys for Betty Jean Green, Martin King, Deborah Lapidus Fisher, Lisa Lapidus Cohen and Barry Lapidus

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice has been hand delivered to J. Stanley Rogers, ROGERS & RICHARDSON, 100 N. Spring Street, Manchester, Tennessee 37355, this 7th day of December, 1990.

s/William L. Harbison
William L. Harbison

IN THE CHANCERY COURT OF
COFFEE COUNTY, TENNESSEE,
AT MANCHESTER

NOS. 90-87 and 90-88

IN RE:

ESTATE OF DAVE KING,

Deceased.

NOTICE OF CONTEST

The undersigned, counsel for CAROLYN HIGDON, hereby give notice that she contests the validity of the instruments dated January 18, 1985, and April 8, 1985, purporting to be the Last Will and Testaments of DAVE KING, deceased. Petitioner will designate the issues of devisavit vel non at the appropriate time.

Respectfully submitted this 17 day of January, 1995.

ROGERS, RICHARDSON & DUNCAN

BY: s/J. Stanley Rogers
J. Stanley Rogers

BY: s/Doyle E. Richardson
Doyle E. Richardson
Attorneys for CAROLYN HIGDON
100 North Spring Street
Manchester, TN 37355
(615) 728-0820

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel for all parties at interest in this cause by delivering a true and exact copy of said pleading to the offices of said counsel or by placing a true and exact copy of said pleading in the United States Mail, addressed to said counsel at his office with sufficient postage thereon to carry the same to its destination, as follows:

George E. Barrett, Esq.
P.O. Box 2846
Nashville, TN 37219

William L. Harbison, Esq.
O'Hare, Sherrard & Roe
424 Church Street, Suite 2000
Nashville, TN 37219

James H. Henry, II, Esq.
Henry & McCord
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Tullahoma, TN 37388

IN THE CHANCERY COURT
OF COFFEE COUNTY, TENNESSEE
AT MANCHESTER

NOS. 90-87 AND 90-88

IN RE:

ESTATE OF DAVE KING,

Deceased.

CERTIFICATE OF CONTEST

BETTYE JEAN GREEN, MARTIN KING, DEBORAH LAPIDUS FISHER, LISA LAPIDUS COHEN, AND BARRY LAPIDUS (the "Contestants"), having filed their petition in this Court showing that they are the heirs of DAVE KING, deceased, the praying that they be allowed to contest the validity of the paper writing admitted to probate on January 17, 1991, as the Last Will and Testament of DAVID KING and that they be allowed to submit two instruments dated January 18, 1985,

and April 8, 1985, for probate, the originals of which were tendered to the Court on January 17, 1991; and process having been issued and served on CAROLYN HIGDON, beneficiary and the person named Executor in said Will; and LEON KANOIVICKI and MAURICIO KANOIVICKI, LESLIE RODES, MAIN STREET CHURCH OF CHRIST, HATTIE BILES, FREEMAN MACON, THE JEWISH SYNAGOGUE, HARRY B. GILLEY, and the legatees and devisees under said instrument, before the hearing date of January 17, 1991, and the said CAROLYN HIGDON having filed Notice of Contest; and the said contestants having given bond in the penalty of $500 per contestant, payable to the said CAROLYN HIGDON and conditioned as required by law; and the said aforementioned devisees and legatees having appeared and given a similar bond payable to the contestants;

IT IS ORDERED by the Court that the Clerk make out and certify a complete transcript of the record and proceedings in this Court, and transmit the same together with the three instruments: (1) holographic instrument, (2) instrument dated January 18, 1985, and (3) instrument dated April 8, 1985, submitted for probate as the Will of DAVID KING, deceased, as aforesaid, and the prosecution bonds entered into by the parties to the Circuit Court of Coffee County.

ENTER this the 17th day of January , 1992.

s/John W. Rollins
JUDGE holding the Chancery Court of Coffee County, Tennessee

APPROVED FOR ENTRY:

s/George E. Barrett
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Attorney for Main Street
Church of Christ

IN THE CHANCERY COURT OF
COFFEE COUNTY, TENNESSEE,

NOS. 90-87 and 90-88

IN RE:

ESTATE OF DAVE KING,

Deceased.

BOND OF WILL CONTESTANT AND BENEFICIARY

WHEREFORE, three Wills in the subject case have been submitted for probate, one being a holographic instrument and undated, the second being dated January 18, 1985 and the third dated April 8, 1985; and wherefore, each of these Wills have been contested by some interested party thereto and the issues join for submission to Circuit Court as a Will contest; and whereas the Main Street Church of Christ is named as a beneficiary in the April 8, 1985 Will

and in the holographic Will, but in differing amounts and is unnamed as a beneficiary in the January 18, 1985 Will and since contest has been raised by some party to each of these Wills, the Main Street Church of Christ joins issue in the proceedings in regard to each of these Wills and submits its bond herewith in the statutory amount of $500.00 as a beneficiary under the holographic Will, as a contestant under the January 18, 1985 Will and as a beneficiary and contestant under the April 8, 1985 Will.

Pursuant thereto, we, the Main Street Church of Christ, principle and Robert L. Huskey, surety, acknowledge ourselves indebted and bound unto such other parties to this Will contest as the Court would deem appropriate under the facts of this case in regard to each of these three Wills to the degree that same

is necessary and appropriate according to the Court to pay any and all costs which the Court should deem appropriate that the Main Street Church of Christ should pay stemming from this action; and upon compliance with any such order of the Court, this obligation shall be void.

This the _____ day of February, 1991.

MAIN STREET CHURCH OF CHRIST

BY: s/Robert L. Huskey
Attorney

ROBERT L. HUSKEY

s/Robert L. Huskey
SURETY

To:

GEORGE E. BARRET
WILLIAM L. HARBISON
217 2ND Av. N.
P.O. Box 3846
Nashville, TN 37219

LEON KANOIVICKI, with Argentinian identification number 10,809.096 with permanent residence at Dean Funes, 2910 Córdoba Argentina y MAURICIO KANOIVICKI with identification number 6,505,696 with permanent residence at the above, both with respect to the inheritance of David King respectfully wish to declare:

I) That by telephone we have been informed of the death of our uncle, Mr. David King which occurred in the United States of America as well as the pending legal proceedings in said Court of the inheritance of the aforementioned.

II) That we have also been notified of the hearing by said Court on the 17th of January of 1991 and we have received

copies of diverse documents in English that explain the proceedings related to the inheritance of David King. We challenge such notification because they were not in Spanish, nor were they validated by proper legal authorities. Such failure to notify us with the documents translated into Spanish has impeded us from exercising proper rights of defense.

III) We want also to emphasize that the short time until the 17th of January of 1991, when the hearing will be held, leaves it materially impossible for the above mentioned to attend. We also must point out that we are not in fiscal conditions to acquire the passage, take out a passport, obtain visas and to contract with professional counsel, etc. in the little time before the 17th of next year.

The County Court must give merit to the great amount of time needed to travel from Argentina to the U.S.A. for such purpose.

To this end, based on what we have said and the right of defense, we request that the hearing set for the 17th of January of 1991 be suspended and that a new date be set not before the 30th of March of 1991. With this petition, we, the undersigned, request that the County court weighs the material and time considerations needed for travel arrangements to the U.S.A. and in such [ ] allow adequate access to the legal proceedings pertaining to David King's inheritance and permit us to hire the services of legal counsel to defend our interest in said inheritance.

IV) Keeping in mind that we have received word of the slow deterioration

of David King's mental health for many years, and given that three wills have been presented to said Court, we challenge said wills as much regarding their content as well as their form, and emphasize, that before deciding which testament is valid, it will be necessary for the Court to establish whether David King had use of his full mental faculties and whether he was capable of declaring a final will and testament.

The motive for this request is based on contacts with relatives which suggested that David King was lacking in his mental health which could have impeded his ability to write a will. Were this proven the Court could not accept any of the wills.

This demands numerous expert and scientific investigations and tests to concretely determine what was the mental

capacity of King at the time of the writing of the final testaments in question, which are being challenged.

V) Keeping in mind that to this date we have not received legal copies duly translated into Spanish and made legal through proper Argentine authorities, we request that the legal proceedings be suspended until we have legal notice of said proceedings. We reserve the right to present exceptions, defense, offering of additional evidence, challenges, etc. which are necessary to protect our rights. Reiterating that any legal document must be sent to the above mentioned address in Argentina.

VI) We wish it to be known that this text has been sent to George E. Barret, William L. Harbisson and Rogers and Richards (all lawyers in this case), as well as to respective cousins of the

undersigned that also could claim right of inheritance by their relation as nephews and nieces to David King.

We request that this petition be honored by the Court in the name of Justice.

LEON KANOIVICKI MAURICIO KANOVICKI

IN THE CIRCUIT COURT FOR THE FOURTEENTH
JUDICIAL DISTRICT
AT MANCHESTER, TENNESSEE

NO. 24,954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN, and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

Defendant-Contestant,

AND

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN, and BARRY LAPIDUS,

Defendants-Contestants.

**BRIEF OF THE KING PETITIONERS
IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

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ORAL ARGUMENT IS REQUESTED

TABLE OF AUTHORITIES

[Table of Authorities has been Omitted]

I. INTRODUCTION AND STATEMENT OF THE CASE

In this will contest proceeding, three wills have been propounded as the last will of David King. Bettye Jean Green, Martin King, Deborah Lapidus Fisher, Lisa Lapidus Cohen, and Barry Lapidus (the "King Petitioners"), have propounded two wills dated January 18, 1985 and April 8, 1985. In addition, Carolyn Higdon has propounded an undated handwritten document (the "Handwritten Document") as the last will of David King.

In the answer to the complaint filed by the King Petitioners, Carolyn Higdon admits that the two wills propounded by the King Petitioners were duly executed by Mr. King. However, Mrs. Higdon asserts the affirmative defenses of undue influence and lack of testamentary

capacity to support her contention that these are not the last wills of Mr. King. In the answer to the complaint filed by Mrs. Higdon, the King Petitioners deny that the Handwritten Document is Mr. King's last will, and assert certain affirmative defenses, including Carolyn Higdon's undue influence over Mr. King.

The relationship between David King and Carolyn Higdon, as well as other issues relevant to this Motion, has been the subject of prior litigation in the Coffee County Chancery Court (the "State Court Action") and the United States District Court for the Eastern District of Tennessee (the "Federal Court Action"). Pursuant to the findings of fact and conclusions of law in the prior litigation, and pursuant to the sworn

testimony related thereto,[1] no genuine issue exists as to any material fact in this proceeding.

The grounds for the Motion for Summary Judgment are twofold. First, as a matter of law Carolyn Higdon cannot establish that the wills propounded by the King Petitioners were procured by undue influence, or that David King lacked testamentary capacity at the time of their execution. Second, as a matter of law Mrs. Higdon is unable to carry her burden of establishing that the

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[1] The King Petitioners have filed herewith and incorporate herein an Appendix containing: (1) the Courts' findings of fact and conclusions of law in the Federal Court Action and the State Court Action in the prior litigation; and (2) portions of the depositions and trial testimony of Carolyn Higdon, Harry Barr Gilley, and others. Citations to the Appendix in this Brief will be "App., Exh. __, p. __."

Handwritten Document propounded by her is the last will of David King.

II. STATEMENT OF UNDISPUTED FACTS

A. THE BACKGROUND OF DAVID KING

David King was born in Russia in 1897 and immigrated to the United States at the age of fifteen. In 1917, Mr. King moved to Manchester, Coffee County, Tennessee. [App., Exh. 1, p. 3.] When he arrived in Coffee County, Mr. King began selling housewares and supplies door-to-door. He used his wages to make down payments on and secure options to purchase small tracts of real estate. Mr. King married Clarine May, the daughter of a prominent landowner in Coffee County. Id.

Mr. King became a figure of substantial influence in Manchester. In addition to his real estate and auction

business, Mr. King obtained a controlling interest in the Peoples Bank of Manchester ("Peoples Bank"), and served as its president for many years. Id. at 3-4. In 1969, Clarine May King died and Mr. King inherited the majority of her estate. By the mid-1970s, Mr. King had amassed a fortune valued at between five and six million dollars. Id. at 4.

Mr. King and his wife had no children. Mr. King's closest living relative was his niece, Melba King Lapidus, of Nashville, Tennessee. Id. The King Petitioners include Mr. King's niece, Bettye Jean Green, his nephew, Martin King, and the children of Melba King Lapidus, Deborah Lapidus Fisher, Lisa Lapidus Cohen, and Barry Lapidus.

In 1974, Carolyn and Gerald Higdon moved to Manchester and began operating The Angus Restaurant ("The Angus") in

partnership with R.B. Sowell. In 1975, the Higdons purchased Mr. Sowell's partnership interest in The Angus for $30,000.00. This money was borrowed by the Higdons from Mr. King. Id. Mr. King subsequently became the benefactor for the development of a new site for The Angus in Manchester. The construction costs associated with the new restaurant, which included "lavish" living quarters for the Higdons upstairs, approximated $750,000.00. The vast majority of these expenses were paid for by Mr. King. Id. at 5. During the time The Angus was operated by the Higdons, Mr. King transferred over $1,000,000.00 to them. Id. at 6.

Between 1975 and 1985, Mr. King became very close to the Higdon family. Mr. King and the Higdons went on several vacations together, including trips to

Hawaii, Jamaica, and Chicago. These trips were financed by Mr. King. In addition, Mr. King gave jewelry and a fur piece to Carolyn Higdon. By early 1985, Mr. King was spending as much as thirteen or fourteen hours per day with one or both of the Higdons. At this time, "a relationship of trust and confidence existed between King and the Higdons." Id.

B. THE WILLS OF DAVID KING

1. Introduction.

Three documents have been propounded in this matter as the last will of David King. The two documents propounded by the King Petitioners are signed, witnessed, and dated January 18, 1985, and April 8, 1985, respectively. The Handwritten Document propounded by Carolyn Higdon is not dated.

2. The January 18, 1985 Will.

The January 18, 1985 Will was prepared by Mr. King's longtime attorney, Harry Barr Gilley. [App., Exh. 6, p. 9.] At the time he prepared this will, Mr. Gilley knew of no prior wills of Mr. King, although Mr. King had discussed the need for a will with him from time to time over the years. Id. at 10. Only Mr. King and Mr. Gilley were present when the bequests contained in this will were discussed. Id. at 13. At Mr. King's request, the January 18, 1985 will was witnessed by Frank and Fred Deadman at the Deadman Funeral Home in Manchester. Id. at 11. Other than Mr. King, Mr. Gilley, and Frank and Fred Deadman, no one was present when the will was executed. Id. at 13-14.

The January 18, 1985 will leaves the residue of Mr. King's estate to Mr.

King's nieces and nephew, Melba King Lapidus, Martin King, and Bettye Jean Green. The King Petitioners, or anyone acting on their behalf, were not involved in the preparation or execution of this will in any manner. Id. at 13. [App., Exh. 7, p. 13.] Mr. Gilley maintained possession of this will until these probate proceedings. [App., Exh. 6, p. 14.]

3. The April 8, 1985 Will.

Mr. Gilley and Mr. King discussed the April 8, 1985 will in the lobby of Peoples Bank during the week prior to its execution by Mr. King. No one else was present during this discussion. Id. at 16. Based on this discussion, the will was prepared by Mr. Gilley the week before its execution. Id. On April 8, 1985, Mr. Gilley met Mr. King at his home

and they again discussed the will alone before going to Peoples Bank. Id. at 16-17.

The April 8, 1985 will was witnessed by Melinda Ashburn and Wayne Bramblett, employees of Peoples Bank, in Mr. Bramblett's office. Other than Mr. King, Mr. Gilley, and the witnesses, no one else was present at the execution. Id. at 18-19. Like the January 18, 1985 will, the April 8, 1985 will leaves the residue of his estate to his blood relatives, the King Petitioners. [App., Exh. 1, p. 9.] Mr. Gilley had no contact with any member of Mr. King's family with regard to the preparation or execution of the April 8, 1985 will. [App., Exh. 6, pp. 22-23; App., Exh. 7, p. 13.] Mr. Gilley also maintained possession of this will until these probate proceedings. [app., Exh. 6, p. 19.]

4. The Handwritten Document.

The Handwritten Document propounded by Carolyn Higdon leaves the residue of Mr. King's estate to Mrs. Higdon. It "is difficult to read -- the writing slants sharply from left to right. In addition, it appears that the [Handwritten Document] was written in two different colors of ink." [App., Exh. 1, p. 10.] Significantly, Mr. Gilley had no conversations with Mr. King regarding the preparation of the Handwritten Document. [App., Exh. 6, p. 62-63.] Moreover, during his discussions with Mr. Gilley prior to the preparation and execution of the January 18, 1985 and April 8, 1985 wills, Mr. King never mentioned an intent

or desire to leave a bequest to Carolyn Higdon.[2]

Mrs. Higdon testified in the Federal Court Action and in a related deposition that she does not know when Mr. King wrote or signed the Handwritten Document, and that she was not with Mr. King when it was written.[3] The Handwritten

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[2] This issue was the subject of inquiry by the District Court during Mr. Gilley's testimony in the Federal Court Action:

> Q. Did [Mr. King] mention Mrs. Higdon at any other time, as far as the will was concerned, until that last time he appeared [on April 9, 1985]?
> A. [Illegible in original document]

[3] Carolyn Higdon testified as follows on the issue of when the Handwritten Document was written and signed by Mr. King:

> Q. You don't know when the [Handwritten Document] was written, do you?
> A. I don't know when it was written, no.
>
> * * *

Document was given to Carolyn Higdon by Mr. King on April 9, 1985, and she maintained possession of it until surrendering it to her attorney prior to the Federal Court Action. [App., Exh. 4, pp. 581-82; App., Exh. 5, pp. 102, 106.]

C. THE PREVIOUS LITIGATION BY THE CO-CONSERVATORS FOR DAVID KING AGAINST THE HIGDONS

Pursuant to a petition filed by Melba King Lapidus in the Coffee County Chancery Court on April 16, 1985, Mrs. Lapidus was appointed as her uncle's conservator. See In the Matter of David King, Ward, No. 85-95 (Coffee Co. Chanc.

A. If you are asking me if I was with him, when the [Handwritten Document] was written, I wasn't. [App., Exh. 4, p. 764].
Q. Do you know when Mr. King signed this [Handwritten Document]?
A. No. [App., Exh. 5, p. 110.]

Ct. filed Apr. 16, 1985). Harry Barr Gilley was appointed co-conservator shortly thereafter.

On May 10, 1985, Melba King Lapidus, in her capacity as conservator for Mr. King, filed a lawsuit against Carolyn and Gerald Higdon in the Coffee County Chancery Court. See Melba King Lapidus, as Conservator for the Person and Estate of David King v. Gerald Higdon, et al., No. 85-110 (Coffee Co. Chanc. Ct. filed May 10, 1985) (the "State Court Action"). The complaint in the State Court Action was subsequently amended to add Harry Barr Gilley as a plaintiff in his capacity as co-conservator. The complaint alleged, inter alia, that Carolyn and Gerald Higdon exercised undue influence over Mr. King.

The State Court Action came on for hearing on June 4-5, 1985, pursuant to

the motion by Melba King Lapidus, as conservator, for an injunction preventing Carolyn and Gerald Higdon from attempting to see Mr. King, and pursuant to a motion to remove Mrs. Lapidus as Mr. King's conservator. During this hearing, testimony was offered from fifteen witnesses, and a report was presented to the Court from Mr. King's guardian ad litem, James H. Henry. At the close of proof, this Court stated its ruling from the bench:

> I think after two days of testimony, I think I can pretty well figure out how this case should be decided without further argument. . . .
>
> I don't see any reason to remove [Melba King Lapidus] as conservator of [Mr. King's] person. I think she's done a fine job of taking care of him and I think she should remain, so I'm going to dismiss that petition. . . .
>
> I'm going to modify [the injunction against Carolyn and

> Gerald Higdon] and say that they will see him in the presence of these attendants; that they will not discuss any business or discussion of that kind with him. . . . Those visits should be reasonable visits; not long extended ones that would wear him out. . . .
>
> These people [Carolyn and Gerald Higdon] owe [Mr. King] some money. They have come up with approximately a million dollars over ten years that he's given them for whatever reason. I make no decision on what that was at all. But we have got some peculiar circumstances in this situation and that's why I'm imposing it upon these people [the Higdons] at this time.

[App., Exh. 3, pp. 482-86.]

On October 29, 1985, Melba King Lapidus was murdered by a bomb explosion in her home. After her death, her husband Charles Lapidus was appointed to replace her as co-conservator. [App., Exh. 1, p. 13.] On April 15, 1986, the co-conservators for Mr. King filed an action against Carolyn and Gerald Higdon,

and others, in the United States District Court for the Eastern District of Tennessee, Winchester Division. See Charles Lapidus, Harry Barr Gilley, Co-Conservators for David King v. Carolyn Higdon, et al., No. CV-4-86-32 (E.D. Tenn. 1988) (the "Federal Court Action"). The State Court Action was subsequently removed to federal court and consolidated with the Federal Court Action for trial April 25-28, 1988.

On April 29, 1988, the District Court entered an order in the Federal Court Action awarding the co-conservators a judgment against defendants James Littlefield and Fran Littlefield, Gerald Higdon's sister and brother-in-law, in the amount of $602,471.62. The judgment was based on loans from Mr. King to the Littlefields for which repayment was not made. On May 16, 1988, the District

Court entered an order in the Federal Court Action awarding the co-conservators a judgment against defendant Harold Paul Christian, Carolyn Higdon's brother, in the amount of $3,000.00. The judgment was based on Mr. Christian's admission that he received certain property and benefits from David King for which he paid no consideration and which were not subsequently forgiven from David King.

On May 18, 1988, the District Court entered a Memorandum and Order awarding the co-conservators a joint and several judgment against Carolyn and Gerald Higdon in the amount of $709,294.00. [App., Exh. 1.] $671,294.00 of this amount was for "loans owed by the Higdons to David King," and $38,000.00 was for "monies obtained by the Higdons from David King by virtue of the exertion of undue influence." Id. at 19. (emphasis

supplied). Specifically, the District Court held that Carolyn and Gerald Higdon exerted undue influence over Mr. King between January 31, 1985 and April 9, 1985. Id. at 17. This order was subsequently amended to award the co-conservators $561,426.00 in interest on checks transferred by Mr. King to the Higdons that were designated "loan," for a total judgment against the Higdons in the amount of $1,270,720.00. [App., Exh. 2, p. 5.]

III. LEGAL ARGUMENT AND DISCUSSION

A. SUMMARY OF ARGUMENT

Carolyn Higdon's allegation that the wills were obtained by undue influence is baseless. In addition, based on her position and testimony in the Federal Court Action, Mrs. Higdon is judicially

estopped from asserting that Mr. King lacked testamentary capacity to execute the January 18, 1985 will and the April 8, 1985 will.

As the proponent of the Handwritten Document, Mrs. Higdon has the burden of proving that this instrument is the last will of David King. It is undisputed that Mrs. Higdon does not know when Mr. King prepared or signed the Handwritten Document. Accordingly, because of the existence of duly executed wills dated January 18, 1985 and April 8, 1985, Carolyn Higdon is unable to carry her burden of proving that the Handwritten Document is the last will of David King.

Even if Carolyn Higdon could introduce competent evidence to establish when the Handwritten Document was executed by Mr. King, summary judgment on the issue of its admissibility to probate

is warranted. For example, if the Handwritten Document was executed prior to January 18, 1985, it was revoked by the January 18, 1985 will as a matter of law. If the Handwritten Document was executed between January 18, 1985 and April 8, 1985, it was revoked by the April 8, 1985 will. Moreover, if the Handwritten Document was executed after January 31, 1985, Carolyn Higdon has been adjudicated in the Federal Court Action to have exerted undue influence over Mr. King during this time.

B. THE STANDARD FOR SUMMARY JUDGMENT IN TENNESSEE

Summary judgment has been specifically held to be available in will contest proceedings. See Owen v. Stanley, 739 S.W.2d 782, 786 (Tenn.Ct.App. 1987) (affirming grant of

summary judgment against contestant claiming undue influence and lack of testamentary capacity). A motion for summary judgment shall be granted if the pleadings, sworn testimony, and affidavits demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[4] Tenn. R. Civ. P. 56.03. See generally Blair v. Allied Maintenance Corp., 756 S.W.2d 267, 269 (Tenn.Ct.App. 1988); Macon County

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[4] In the Statement of Undisputed Facts, supra, the facts recited stem directly from memoranda and orders issued by the Coffee County Chancery Court in the State Court Action and the District Court in the Federal Court Action, sworn testimony given in the Federal Court Action, and the deposition testimony of Carolyn Higdon and Harry Barr Gilley. Therefore, in accordance with case law interpreting the propriety of a summary judgment motion, no genuine issue of material fact exists. See Belsky v. Payne, 560 S.W.2d 78, 81 (Tenn.Ct.App. 1977).

Livestock Market v. Kentucky State Bank, 724 S.W.2d 343, 348 (Tenn.Ct.App. 1986).

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986), the United States Supreme Court recognized that a party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion, including identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. 477 U.S. at 323, 91 L. Ed. 2d at 274. Once such a motion is made, however, if the nonmoving party would bear the burden of proof at trial, as Carolyn Higdon would here, she must respond with affirmative evidence in support of each element of her claim. 477 U.S. at 324, 91 L. Ed. 2d at 274.

"By its very terms, [Rule 56] provides that the mere existence of some

alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L. Ed. 2d 202, 211 (1986) (emphasis in original). This burden requires designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324, 91 L. Ed. 2d at 274. In Anderson, the Supreme Court held that the standard for summary judgment "mirrors" the standard for a directed verdict under Rule 50(a); i.e., whether, under governing law, there can be but one reasonable conclusion as to the verdict. 477 U.S. at 250, 91 L. Ed. 2d at 213.

Tennessee courts have embraced the summary judgment analyses set forth in

Celotex and Anderson, and in doing so have defined the standard to be applied when such a motion is made. Citing Celotex, the court in Blair v. Allied Maintenance Corp., 756 S.W.2d 267 (Tenn.Ct.App. 1988) held that a party's case may be dismissed if it is unable to come forward and establish the essential elements of its case on which it will bear the burden of proof at trial. Id. at 270. See also Owen v. Stanley, 739 S.W.2d at 787 (Tenn.Ct. App. 1987) (summary judgment in will contest may be entered if party fails to establish essential element of case on which it will bear burden of proof at trial); Moman v. Walden, 719 S.W.2d 531, 533 (Tenn.Ct.App. 1986) (if nonmoving party fails to establish existence of essential element of claim, there can be no genuine issue as to any material facts since all

other facts are necessarily rendered immaterial.)

In order to defeat this motion for summary judgment, Carolyn Higdon must demonstrate, legally and factually, that she possesses a prima facie case that would withstand a motion for a directed verdict at trial. As set forth, infra, Carolyn Higdon is unable to meet this exacting standard and, accordingly, summary judgment in favor of the King Petitioners is warranted as a matter of law.

C. THE WILLS PROPOUNDED BY THE KING PETITIONERS ARE VALID AS A MATTER OF LAW

1. There is No Evidence that the Wills Propounded by the King Petitioners were Procured by Undue Influence.

The burden of proving undue influence regarding the duly executed

wills[5] dated January 18, 1985 and April 8, 1985 is on Carolyn Higdon. 1 H. Phillips & J. Robinson, Pritchard on Wills and Administration of Estates §§ 143, 145 (4th ed. 1983). The King Petitioners deny that they, or anyone acting on their behalf, exerted any influence over Mr. King in the making of these wills, and there is no evidence to support Carolyn Higdon's baseless allegations of undue influence in connection with them. Indeed, every attempt by Carolyn Higdon to develop a theory in the Federal Court Action that

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[5] Carolyn Higdon has not asserted that there are any flaws in the execution or attestation of the January 18, 1985 and April 8, 1985 wills. Rather, her answer admits the due execution of the wills but raises the defenses of undue influence and lack of testamentary capacity.

Mr. King's family unduly influenced him regarding these wills was summarily refuted.[6]

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[6] The testimony of Mr. Gilley, Mr. King's attorney and the draftsman for the January 18, 1985 and April 8, 1985 wills, is undisputed on this issue:

> Q. When Mr. King gave you the instructions for the contents of this [January 18, 1985] will . . ., who was present during that conversation besides you and Mr. King?
> A. No one was. [App., Exh. 6, p. 13.]
>
> Q. [Illegible on original copy]
> A. No. Id. at 15.
>
> Q. Who was present when you had that discussion [regarding instructions from Mr. King for the April 8, 1985 will]?
> A. I don't recall anyone being present.
> Q. Was any of the Lapiduses present at that time.
> A. No. Id. at 16.
>
> Q. Prior to April the 8th, 1985 had you had any contact with any member of Mr. King's family in regard to any will or disposition of Mr. King's

Mr. King's attorney, Harry Barr Gilley, testified that he prepared the January 18, 1985 and April 8, 1985 wills for Mr. King and gave Mr. King independent advice concerning them. See supra pp. 3-4. Independent advice, of course, refutes any claim of undue influence. Askew v. Askew, 619 S.W.2d 384, 386-87 (Tenn.Ct.App. 1981). Finally, despite her current allegations to the contrary, Carolyn Higdon herself testified in the Federal Court Action that she knew nothing about the execution of either of these wills.[7]

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estate?
A. No. [App., Exh. 7, p. 13.]

[7] Carolyn Higdon testified in the Federal Court Action as follows:

Q. Did [Mr. King] tell you he had executed a will in January of '85 where you were not in this

The Tennessee Supreme Court has held that in the absence of proof of undue influence, it is error to allow this issue to be submitted to the jury. See Boyd v. Boyd, 680 S.W.2d 462, 464 (Tenn. 1984). In Boyd, an elderly woman left two wills, one dated in 1974 and one dated in 1977. The contestants of the 1977 will charged that it was obtained through the undue influence of the contestant's brother. The Supreme Court held:

> We find no evidence of undue influence on the part of Alvin Boyd, accused by his sister of

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will?
A. No.
Q. Did he tell you on the morning of April 9th [1985] that he had executed a will the day before at Mr. Gilley's office?
A. No, he didn't.
Q. So you were ignorant of both prior wills on the morning of April the 9th?
A. Yes, I was. [App., Exh. 4, p. 761.]

> having instigated or caused the second will to have been written. There is. . . no testimony that at any time near the date of its execution he exercised any sort of dominion or undue influence over her. Accordingly we are of the opinion that the trial court erred in submitting that issue to the jury and in charging the jury concerning 'suspicious circumstances.'

680 S.W.2d at 464. Boyd constitutes controlling authority for the proposition that the baseless allegation by Carolyn Higdon that the King Petitioners exercised undue influence on mr. King should be removed from the jury.

2. Carolyn Higdon is Judicially Estopped from Maintaining that Mr. King Lacked Testamentary Capacity with Regard to the Execution of the Wills Propounded by the King Petitioners.

In her vigorous defense of the allegations of undue influence against her in the Federal Court Action, Mrs.

Higdon took the position that Mr. King was fully competent in 1985. Indeed, it is difficult to conceive that she could have taken a more vehement position regarding Mr. King's mental capacity in 1985. The record in the Federal Court Action is replete with testimony from Carolyn Higdon regarding Mr. King's mental capacity in 1985.[8] In addition, Carolyn Higdon orchestrated a veritable parade of witnesses before the District

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[8] Although she now asserts that Mr. King lacked testamentary capacity on April 8, 1985, Carolyn Higdon made the following statement under oath with regard to his testamentary capacity on April 9, 1985:

> Q. April 9th, '85, was Mr. King aware and did he know of the properties he had?
> A. Mr. King knew every piece of property he had and every piece of property he ever owned, whether he had it or not, he knew who else owned it. He was well aware of everything in that area. . . . [App., Exh. 4, pp. 707-08.]

Court on the issue of Mr. King's mental capacity during this period of time.[9]

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[9] Melinda Ashburn, an attesting witness to the April 8, 1985 will, offered the following testimony in response from questioning by counsel for Carolyn Higdon:

> Q. Before April the 8th, 1985, did you have, let's restrict ourselves to 1985, January, February, March. Did you have an opportunity to during those three months to be around Dave King there in the [Peoples] bank?
> A. Almost daily. . . .
> Q. [W]here you in the presence of Mr. Wayne Bramblet [sic] and Mr. Dave King during that three month period of time, when banking business was discussed?
> A. Yes, sir. . . .
> Q. Did you have any reason to believe that during that three month period of time that Mr. Dave King was incapable of managing his affairs?
> A. No, sir.
> Q. Or the affairs of the bank?
> A. No, sir. . . .
> Q. [O]n April the 8th, 1985, did you attest to a document that was styled the last will and testament of Dave King?
> A. Yes, sir.
> Q. On the following day, April the, let me ask you this. Did

you form an opinion that day, as to Mr. King's mental alertness. Was he alert that day?

A. Yes, sir. [App., Exh. 4, pp. 674-76.]

Counsel for Carolyn Higdon called additional witnesses to support her position regarding Mr. King's mental capacity during 1985. Al Morris testified as follows:

Q. When was the last time you saw Dave King before he went in the hospital on April 9th, 1985?

A. It was the Sunday prior to his going in the hospital, whatever date that was [April 7, 1985]. . . .

Q. Describe his demeanor that day, his mood, his demeanor, his actions.

A. He had a word for everybody that was in my presence, you know. As I say, I don't recall any details of those conversations, but he had a smile and a handshake for everybody there.

Q. Was he coherent?

A. To me, yes. Id. at 661-62.

Similarly, Wallen Fraley testified as follows:

Q. During the time that you saw . . . [Mr. King] in 1984 and 1985, did you see any problems

The doctrine of judicial estoppel prohibits Carolyn Higdon from now asserting that Mr. King lacked testamentary capacity in an effort to defeat the wills propounded by the King Petitioners. See generally 11 Tenn. Jur. Estoppel § 13, at 135 (1984) (judicial estoppel prohibits a litigant from deliberately shifting positions to suit the exigencies of each particular case that may arise); Bubis v. Blackman, 435 S.W.2d 492, 499 (Tenn.Ct.App. 1968). The doctrine is frequently invoked in will contests to prevent conduct similar to that demonstrated by Carolyn Higdon in this proceeding. See generally 80

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that he had or any changes that had come over him in his ability to carry on a conversation and to remember, to talk with you?

A. No, I did not. Id. at 694.

Am.Jur.2d Wills § 1659; Allen v. Neal, 396 S.W.2d 344, 346-47 (Tenn. 1965). See also Gore v. Howard, 94 Tenn. 577, 30 S.W. 730, 731-31 (1895) (children of decedent held to be estopped from contesting will because of prior agreement purportedly settling claims to their inheritance).

Carolyn Higdon's allegation in this proceeding that Mr. King lacked testamentary capacity when he executed the January 18, 1985 and April 8, 1985 wills directly contradicts her testimony and conduct throughout the Federal Court Action. As a matter of law, she may not maintain this inconsistent position in an effort to prevail in this lawsuit and summary judgment on this issue is warranted. See 11 Tenn. Jur. Estoppel § 13 (1984).

D. CAROLYN HIGDON CANNOT CARRY HER BURDEN OF PROVING THAT THE HANDWRITTEN DOCUMENT IS THE LAST WILL OF DAVID KING

1. The Handwritten Document is Inadmissible to Probate Because There is No Proof as to its Date.

The lack of a date is not fatal to the validity of a holographic will in Tennessee, In Re Jones Estate, 314 S.W.2d 39, 44 (Tenn.Ct.App. 1957), although a date is a formal requirement in many states. See Annot., 22 A.L.R.3d 866 (1968). Nevertheless, in the event a duly executed and dated will exists, the proponent of an undated holographic will must necessarily establish the date of its execution. Otherwise, a jury could only speculate as to whether the holographic will postdates the duly executed will. A verdict cannot be based on speculation, surmise, or conjecture. Law v. Louisville & N.R. Co., 170 S.W.2d

360, 362 (Tenn. 1943); Evensky v. City of Memphis, 350 S.W.2d 76, 79 (Tenn.Ct.App. 1961).

Tennessee courts have expressly forbidden speculation in a will contest proceeding. To warrant submitting issues in a will contest to the jury, there must be evidence that is substantial and material, "and more than a mere scintilla or glimmer of evidence." 25 Tenn. Jur. Wills §76, at 185 (1985); Curry v. Bridges, 325 S.W.2d at 87, 91 (Tenn.Ct.App. 1959). In Curry, the court upheld a directed verdict for the proponents, and characterized the contestant's evidence as "of a type of scintilla or glimmer evidence upon which no verdict, except one which might be based upon pure speculation, could be returned against the will." Id. at 96. See also Davidson v. Gilreath, 273 S.W.2d

717, 719 (Tenn.Ct.App. 1954) (where evidence gives equal support to the inconsistent theories of the parties to a will contest, trial judge should direct a verdict for the party not having the burden of proof).

Although it is undisputed that the Handwritten Document had been signed by Mr. King at the time it was shown to Mr. Gilley on the morning of April 9, 1985, Carolyn Higdon does not know when Mr. King prepared or signed it. See supra p. 5 n. 3. Accordingly, because of the existence of duly executed wills dated January 18, 1985 and April 8, 1985, Mrs. Higdon is unable to carry her burden of proving that the Handwritten Document is the last will of David King and summary judgment is warranted. See Blair v. Allied Maintenance Corp., 756 S.W.2d at 270 (case properly dismissed if party is

unable to establish essential elements of case on which it will bear the burden of proof at trial).

2. Even if the Date of the Handwritten Document Can be Established, the Document is Inadmissible to Probate as a Matter of Law.

a. If the Handwritten Document was Executed prior to January 18, 1985, it was Revoked by the January 18, 1985 Will; If the Handwritten Document was Executed between January 18, 1985 and April 8, 1985, it was Revoked by the April 8, 1985 Will.

Subsequent inconsistent wills have the effect of revoking prior wills, even without the existence of an express revocation clause. Tenn. Code Ann. § 32-1-201(1); Hickey v. Beeler, 171 S.W.2d 277, 279-80 (Tenn. 1943). Accordingly, if the Handwritten Document

was executed by Mr. King prior to January 18, 1985, as a matter of law it was revoked by the January 18, 1985 will. If the Handwritten Document was executed by Mr. King between January 18, 1985 and April 8, 1985, it was revoked by the April 8, 1985 will.

b. If the Handwritten Document was Executed on or After January 31, 1985, Carolyn Higdon was Exercising Undue Influence Over David King During this Time.

Carolyn Higdon is bound by the findings of the District Court in the Federal Court Action pursuant to the doctrine of res judicata. The Federal Court Action afforded Mrs. Higdon a full and fair opportunity to litigate the issue of her undue influence over Mr. King, and therefore the findings of fact and conclusions of law of the District

Court are binding on her. See 22 Tenn. Jur. Res Judicata § 31.

Although Carolyn Higdon acknowledges that she does not know when Mr. King prepared or signed the Handwritten Document, it is undisputed that the Handwritten Document had been executed by Mr. King at the time it was given to Carolyn Higdon on April 9, 1985. As set forth above, if the Handwritten Document was executed prior to April 8, 1985, it was revoked by Mr. King's April 8, 1985 will. See Tenn. Code Ann. § 32-1-201(1). Moreover, it was adjudicated in the Federal Court Action that Carolyn Higdon exerted undue influence over Mr. King between January 31, 1985 and April 9, 1985. As a matter of law, if the Handwritten Document was executed by Mr. King during this time, it is admissible

to probate because of her exertion of undue influence over him.

The District Court held that a confidential relationship existed between Carolyn Higdon and Mr. King "by early 1985." [App., Exh. 1, p. 6.] When a confidential relationship is established, the law presumes undue influence and the burden shifts to Carolyn Higdon to establish that undue influence was not exercised. See Kelley v. Brading, 337 S.W.2d 471, 475 (Tenn.Ct.App. 1960). Mrs. Higdon was unable to meet this burden in the Federal Court Action and, as a matter of law, she is unable to meet it in this case. Because the District Court found that Mrs. Higdon was exercising undue influence over Mr. King between January 31, 1985 and April 9, 1985, to the extent the Handwritten Document was executed by Mr. King after

January 31, 1985, she is not entitled to admit it to probate. [App., Exh. 1, p. 17.]

V. CONCLUSION

As a matter of law, Carolyn Higdon cannot meet her burden of proving that the wills propounded by the King Petitioners were procured by undue influence, or that David King lacked testamentary capacity at the time of their execution. Moreover, Carolyn Higdon is unable to carry her burden of proving that the Handwritten Document is the last will of David King. For these reasons, summary judgment against Carolyn Higdon is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed by United States Mail, postage prepaid, to J. Stanley Rogers and Doyle E. Richardson, ROGERS, RICHARDSON & DUNCAN, 100 North Spring Street, Manchester, Tennessee 37355, Attorneys for Carolyn Higdon; James H. Henry, HENRY & McCORD, P. O. Box 538, Tullahoma, Tennessee 37388; Robert L. Huskey, P.O. Box 777, Manchester, Tennessee 37355; Michael I. Mossman, Noel Place, Suite 202, 200 Fourth Avenue North, Nashville, Tennessee 37219; and by Certified Mail, Return Receipt Requested, to Dr. David Burgos, Sarmiento, 1411, Capital Federal, Buenos Aires, Argentina; Messrs. Leon and Mauricio Kanoivicki, c/o Dean Funes, 2901, Cordoba Capital, Argentina, this 7th day of August, 1991.

S/William L. Harbison
William L. Harbison

IN THE CIRCUIT COURT FOR THE FOURTEENTH
JUDICIAL DISTRICT
AT MANCHESTER, TENNESSEE

NO. 24,954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

Defendant-Contestant,

and

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

**APPENDIX TO BRIEF OF THE KING PETITIONERS
IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT**

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EXHIBIT 1 May 18, 1988 Judgment and Memorandum Opinion in Charles Lapidus, et al. v. Gerald Higdon, et al., No. Civ. 4-86-32 (E.D. Tenn. 1988).

EXHIBIT 2 October 5, 1988 Amended Judgment and Memorandum and Order in Charles Lapidus, et al. v. Gerald Higdon, et al., No. Civ. 4-86-32 (E.D. Tenn. 1988).

EXHIBIT 3 Transcript of June 4-5, 1985 Proceedings in Melba King Lapidus, as Conservator for the Person and Estate of David King v. Gerald Higdon, et al., No. 85-110 (Coffee Co. Chanc. Ct. filed May 10, 1985).

EXHIBIT 4 Transcript of April 25-28, 1988 Trial Proceedings in Charles Lapidus, et al. v. Gerald Higdon, et al., No. Civ. 4-86-32 (E.D. Tenn. 1988).

EXHIBIT 5 July 9, 1986 Deposition Transcript of Carolyn Higdon.

EXHIBIT 6 May 12, 1987 Deposition Transcript of Harry Barr Gilley.

EXHIBIT 7 April 21, 1988 Deposition Transcript of Harry Barr Gilley.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed by United States Mail, postage prepaid, to J. Stanley Rogers and Doyle E. Richardson, ROGERS, RICHARDSON & DUNCAN, 100 North Spring Street, Manchester, Tennessee 37355, Attorneys for Carolyn Higdon; James H. Henry, HENRY & McCORD, P.O. Box 538, Tullahoma, Tennessee 37388; Robert L. Huskey, P.O. Box 777, Manchester, Tennessee 37355; Michael I. Mossman, Noel Place, Suite 202, 200 Fourth Avenue North, Nashville, Tennessee 37219; and by Certified Mail, Return Receipt Requested, and to Dr. David Murgos, Sarmiento, 1411, Capital Federal, Buenos Aires, Argentina; Messrs. Leon and Mauricio Kanoivicki, c/o Dean Funes, 2901, Cordoba Capital, Argentina, this 7th day of August, 1991.

s/William L. Harbison
William L. Harbison

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DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

RESPONSE OF CAROLYN HIGDON TO MOTION FOR SUMMARY JUDGMENT FILED BY KING PETITIONERS

Comes CAROLYN HIGDON and files this Response to the Motion for Summary

Judgment filed by the King Petitioners and would show unto the Court that the Motion should be overruled because genuine issues of material fact remain, and the King Petitioners are not entitled to judgment as a matter of law. In support of this response, CAROLYN HIGDON files the following:

1. Memorandum of Law with Exhibits, and

2. Affidavit of CAROLYN HIGDON dated September 30, 1991.

Respectfully submitted this day of October, 1991.

ROGERS, RICHARDSON & DUNCAN

BY: s/J. Stanley Rogers
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel for all parties at interest in this cause by delivering a true and exact copy of said pleading to the offices of said counsel or by placing a true and exact copy of said pleading in the United States Mail, addressed to said counsel at his office with sufficient postage thereon to carry the same to its destination, as follows:

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Messrs. Leon and Mauricio
Kanoivicki
c/o Dean Funes, 2901
Cordoba Capital, Argentina

This _____ day of October, 1991.

ROGERS, RICHARDSON & DUNCAN

BY: s/J. Stanley Rogers

IN THE CIRCUIT COURT FOR THE FOURTEENTH
JUDICIAL DISTRICT AT
MANCHESTER, TENNESSEE

NO. 24,954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

Defendant-Contestant,

and

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN, and BARRY LAPIDUS,

Defendants-Contestants.

MEMORANDUM OF LAW IN SUPPORT OF RESPONSE OF CAROLYN HIGDON TO MOTION FOR SUMMARY JUDGMENT FILED BY KING PETITIONERS

FACTS

David King was born in Russia in 1897 and immigrated to the United States at the age of 15, as did several of his brothers. District Court Order, p. 3, attached hereto as Exhibit A. He moved to Manchester, Coffee County, Tennessee, in 1917. Id. His first work in Coffee County was as a peddler selling housewares and supplies while walking house-to-house. Id. King was very frugal and used the money he could save to make down payments on or procure options of small tracts of real estate. Id. These purchases were made at a time when land prices in Coffee County were extremely low. Id. Until 1985, Mr. King spent much of his time and effort in the buying and selling of real estate. Id. Through saving his money and wise

investments in real estate, Mr. King was able to acquire substantial wealth.

David King married Clairene May, the only daughter of a prominent landowner in Coffee County. Id. In addition to the wealth which he was himself able to acquire, Mr. King also managed the substantial property which his wife inherited from her parents when they died. Id.

Mr. King became a figure of substantial influence in Manchester. Id. In addition to a real estate and auction business which David King operated, he also operated a controlling interest in the Peoples Bank of Manchester and was for many years the President of the Bank. District Court Order, p. 3-4.

Mr. King was an intelligent and successful businessman and was a generous

man. District Court Order, p. 4. King's wife died in 1969.

In 1974, Gerald and Carolyn Higdon moved to Manchester and began the operation of the Angus Restaurant in partnership with R.B. Sowell. Id. The Higdons were married and had three children. Mr. King was a frequent customer of the Angus and within a year of the Higdon's move to Manchester, Mr. King had become a friend of the family. Id. As the friendship grew, King spent more and more time at the Angus. Id. In 1975, the partnership between the Higdons and Sowell terminated, and the Higdons bought out Mr. Sowell's partnership interest in the restaurant for $30,000. David King loaned the Higdons the purchase money. Id.

David King was fond of dining in fine restaurants and lamented that there

were none in the Manchester area. District Court Order, p. 5. King encouraged the Higdons to build and operate a new Angus Restaurant in Manchester in the tradition of the finest Nashville restaurants. Mr. King was clearly the Higdons' benefactor in both the development and initial operation of the new Angus. King helped the Higdons in the location of the tract of land for the building and loaned them the money for its purchase. Id. He prevailed upon them to follow the concept of a fine restaurant rather than a steak house along the lines of a Western Sizzlin' restaurant. Id. Mr. King assisted the Higdons in obtaining restaurant fixtures, as well as fixtures for the Higdons' living quarters, which were in the upstairs part of the restaurant. Id.

Following the building of the new Angus Restaurant, Mr. King was an almost daily customer. Id. On most days, he ate both lunch and dinner there and was very often there when the restaurant closed at night counting the receipts with Gerald Higdon. Id. Gerald Higdon became Mr. King's driver and essentially took him wherever he wanted to go. Often the trips would be to take him to the bank, to pick him up and bring him to the restaurant, or to assist him in looking at real property in which he was interested. Id. at p. 6.

Between 1975 and 1985, David King became very close to the Higdon family and developed a family-type relationship, with Mr. King acting as a grandfather figure to the Higdon family. Id. Mr. King and the Higdons went on several vacations together, including trips to

Hawaii, Jamaica, and Chicago. Id. Mr. King gave jewelry to Mrs. Higdon and on one occasion, gave her a fur piece. These trips or vacations were paid for by Mr. King. By early 1985, Mr. King was spending as much as thirteen to fourteen hours per day with one or both of the Higdons. Id. By early 1985, a relationship of trust and confidence existed between King and the Higdons. Id.

Prior to September 1984, Melba Lapidus did not frequently visit Dave King and was not actively involved in the care of his needs, including his medical care. After September, 1984, Melba Lapidus began visiting King more often and urged him to sell his home in Manchester and move to Nashville. Carolyn Higdon Affidavit. During this time, Melba Lapidus asserted more

influence over Mr. King and began inquiring into his personal and business affairs. Carolyn Higdon Affidavit. After Melba Lapidus' visits, Mr. King would become very agitated and emotionally distraught. Carolyn Higdon Affidavit.

On January 18, 1985, Dave King executed a Will which was prepared by Attorney Harry B. Gilley. This Will was executed at the Deadman Funeral Home in Manchester, Tennessee, and was witnessed by Frank Deadman and Fred Deadman. This Will named King's nephew, Martin King, as Executor and requested that Attorney Harry B. Gilley be employed to assist in the settlement of his estate. This Will bequeathed the sum of $10,000 to each of King's nephews, Mauricio Kanoivicki and Leon Kanoivicki. The residue of his estate was to pass equally to his nephew,

Martin King; his niece, Melba Lapidus; and his niece, Bettye Jean Green. See Will of January 18, 1985, attached hereto as Exhibit B.

On April 8, 1985, Dave King executed another Will when he went to Attorney Harry B. Gilley's office. The Will was executed at the Peoples Bank & Trust Company of Manchester, Tennessee, in Wayne Bramblett's office. The witnesses were Wayne Bramblett and Melinda Ashburn, Bramblett's secretary. This Will named Harry B. Gilley as Executor. This Will bequeathed the sum of $5,000 each to King's nephews, Mauricio Kanoivicki and Leon Kanoivicki, and King's secretary, Letha Rhodes. King bequeathed the sum of $10,000 to Main Street Church of Christ in memory of his wife. King bequeathed the sum of $5,000 to the Jewish Synagogue which his nephew, Martin King, attended.

The Will provided that Hattie Biles and Freeman Macon have life estates in the residence in which each resided. King directed that his real property be sold subject to those life estates. The residue of the estate was to pass to Martin King, Melba Lapidus, and Bettye Jean Green, in equal shares. See Will of April 8, 1985, attached hereto as Exhibit C.

On April 9, 1985, Melba King Lapidus called Carolyn Higdon and told her that she was looking for Mr. King to take him to the hospital in Nashville. Id. After that phone call, the Higdons called Mr. King, and Mr. King requested that the Higdons take him to the hospital. Id. Mr. Higdon picked up Mr. King in his car at Mr. King's home and drove him back to the Angus. Id. at p. 10. According to the Higdons' testimony, Mr. King had with

him that morning the holographic Will which bequeathed the vast majority of the King Estate to Mrs. Higdon.

After Mr. King and Mr. Higdon arrived at the Angus, Carolyn Higdon typed a copy of the Will. Id. Mrs. Higdon then drove Mr. King to Harry B. Gilley's office. A Will was prepared and executed at Gilley's office based on the holographic Will with the exception of a few changes, including naming Harry B. Gilley as Executor, changing the amounts left to the Argentine nephews, and allowing Harry B. Gilley to buy one-half of his bank stock. This Will was witnessed by Melinda Ashburn and Wayne Bramblett. Gilley deposition, p. 56, attached hereto as Exhibit D.

The Higdons took Mr. King to Nashville, and he was hospitalized on the afternoon of April 9, 1985. Id. His

treating physician, Herman J. Kaplan, M.D., diagnosed Mr. King as suffering from dementia as a consequence of Alzheimer's Disease. He was disoriented as to time, place, and person. Id. For example, upon questioning by Dr. Kaplan, Mr. King answered that Truman was the President of the United States, the current year was 1996, and the month was September. Id. Dr. Kaplan opined at that time that Mr. King was not capable of managing his business affairs. Id. Although he had difficulty in establishing the date of the onset of the dementia, Dr. Kaplan did indicate that in his opinion Mr. King had suffered from dementia and had been unable to manage his business affairs for at least one year prior to April, 1985. Kaplan Deposition, p. 25-26, attached hereto as Exhibit E. Shortly thereafter, Dr.

Kaplan testified that King's condition required him to have 24 hour nursing care. Kaplan deposition, p. 25-26.

The District Court held that Dave King became incapable of managing his business affairs on January 31, 1985. Id. at p. 11. On April 19, 1985, the Chancery Court of Coffee County declared Dave King to be incapable of managing his business affairs and appointed Melba King Lapidus as Conservator for Dave King. Shortly thereafter, Harry B. Gilley was appointed Co-Conservator.

On October 29, 1985, Melba King Lapidus died in a bomb explosion in her home, and Charles Lapidus was appointed as Co-Conservator.

Dave King died on December 3, 1990, and the three Wills were submitted to probate.

The holographic Will left the following special bequests:

a. The sum of $25,000 to the Main Street Church of Christ in Manchester, Tennessee;

b. The sum of $10,000 and a life estate in the house in which they resided to Hattie and Jim Biles.

c. The sum of $5,000 and a life estate in the house in which he resided to Freeman Macon.

d. The sum of $5,000 to Letha Rhodes.

e. The sum of $100,000 each to Melba Lapidus, Martin King, and Betty Jean Greene; and

f. The sum of $25,000 to Harry B. Gilley.

The residue of Mr. King's estate is bequeathed to Carolyn Higdon. The holographic Will has a provision which

states that he did not forget his nephews in Argentina, but that he did not leave them any money because it would be seized by the country. The Will names Carolyn Higdon as Executor and requests that she hire Harry B. Gilley as an attorney. See holographic Will attached hereto as Exhibit F.

LAW

Tennessee Rules of Civil Procedure 56.03 provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A summary judgment is not appropriate in this case, because there are genuine issues of material fact with regard to the issue of

whether Melba Lapidus or the King Petitioners were exercising undue influence at the time the Wills of January 18, 1985, and April 8, 1985, were executed. In addition, genuine issues of material fact remain as to whether Dave King lacked testamentary capacity when the January 18, 1985, and April 8, 1985, Wills were executed. Also, genuine issues of material fact remain as to whether the holographic will is the last valid Will of Dave King.

The United States Supreme Court has held that the moving party bears the initial responsibility of informing the Court of the basis for its motion by identifying relevant portions of the record. Celotex Corp. v. Catrett, 477 U.S. 317, S. Ct. 2548, 91 L. Ed.2d 264 (1986). The non-moving party then bears the burden of designating specific facts

showing that there is a genuine issue for trial. Celotex Corp. 91 L. Ed.2d at 274. Tennessee courts have embraced this summary judgment analysis. Owen v. Stanley, 739 S.W.2d 782 (Tenn.App. 1979); Moman v. Walden, 719 S.W.2d 531 (Tenn.App. 1986).

Carolyn Higdon has met her burden of designating specific facts showing that there are genuine issues of material fact regarding the issue of whether Melba Lapidus or the King Petitioners exerted undue influence over Dave King in the execution of the Wills of January 18, 1985, and April 8, 1985. When a Will is contested on the grounds of undue influence, a very broad range of inquiry is permitted, including the chain of circumstances which led up to and attend the preparation and execution of the Will. 1 Pritchard On Wills and

Administration of Estates (4th ed. 1983), Section 143. Inquiry can be made into many areas including the nature and extent of the testator's estate, the condition, character, and conduct of persons around him, and the testator's business, social, and family relations. Pritchard, Section 145. Undue influence can be proved by circumstantial, as well as direct evidence and is usually shown by proving the existence of suspicious circumstances. Mitchell v. Smith, 779 S.W.2d 384 (Tenn. App. 1989). As the Supreme Court has held: "What is undue influence in the sense of the law must be decided by the application of sound principles and good sense to the facts of each case." Halle v. Summerfield, 287 S.W.2d 57, 61 (Tenn. 1956). Therefore, courts have refrained from proscribing the type or number of suspicious

circumstances that will warrant invalidating a Will on the ground of undue influence. Mitchell, 779 S.W.2d at 388.

The evidence designated by Carolyn Higdon raises genuine issues of material fact on the issue of undue influence. Evidence has been presented as to the existence of several suspicious circumstances which are recognized as relevant in establishing undue influence, including the following: (1) existence of confidential relationship between testator and beneficiary; (2) the testator's physical or mental deterioration; (3) the beneficiary's active involvement in procuring the Will; (4) secrecy concerning the Will's existence; (5) the testator's advanced age; (6) the lack of independent advice in preparing the Will; (7) the testator's

illiteracy or blindness; (8) the testator being in an emotionally distraught state; (9) discrepancies between the Will and the testator's expressed intentions; and (10) fraud or duress directed toward the testator.

In January 1985 and April 1985, Dave King was in a weakened physical and mental state. Dr. Kaplan testified that Dave King suffered from primary dementia as a result of Alzheimer's Disease, and that in his opinion, King had been unable to handle his business affairs for one year prior to April 9, 1985. Kaplan deposition, p. 25. King's condition deteriorated to the point that in May, 1985, Dr. Kaplan concluded that King required attendants around the clock. Kaplan deposition, p. 26. King was hospitalized on April 9, 1985, only one day after executing the Will of April 8,

1985, and only a few short months after executing the Will of January 18, 1985. The weakened mental and physical condition of Dave King are proper factors for a jury to consider in determining whether these Wills should be invalidated on the ground of undue influence.

Another appropriate factor to be considered is King's business, social, and family relationships. It is undisputed that the Higdons and King had a very close, family-type relationship. In addition, King spent thirteen to fourteen hours per day with one or both of the Higdons. King was a grandfather figure to the Higdons. Many of the activities in which the Higdons and King participated were activities usually performed by families, including taking several vacations together.

On the contrary, Melba Lapidus and the other King Petitioners played a very small, insignificant role in Dave King's life prior to September, 1984. At that time, Melba Lapidus became interested in Mr. King's condition and affairs. Mrs. Lapidus began visiting Mr. King more frequently and inquired into his financial affairs. Mrs. Lapidus urged Mr. King to sell his house in Manchester and move to Nashville. Her visits and suggestions that he move away from Manchester made King very upset and emotionally distraught.

The limited involvement of Melba Lapidus in providing for Dave King's medical needs prior to September 1984 and early 1985 is further supported by the testimony of Dr. Kaplan. Dr. Kaplan testified that he did not recall Melba Lapidus accompanying Mr. King to the

doctor's office prior to May 1985, even though he bad been treating Mr. King for several years. Kaplan Deposition, p. 110.

Another appropriate consideration is the fact that King executed three Wills with different dispositions within a three month time period. The dispositions made in the Wills of January 18, 1985, and April 8, 1985, were contrary to Dave King's intentions as expressly stated to Carolyn Higdon and expressed in his holographic Will which was written prior to his physical and mental infirmities. In addition, Dave King had expressed different intentions to Walden Fraley, a long-time business acquaintance. In the District Court hearing, Fraley testified that Dave King had discussed with him on several occasions the manner in which he wanted

to dispose of his money. Fraley related the substance of those conversations as follows:

A This has been back, I I couldn't give you dates, but it's been back five to ten years ago, something like that. Over the different times I have had the conversation I know at least two different time he told me that his nephew Martin wanted him to leave a sizeable sum for the synagogue or for religious purposes in Nashville and I couldn't quote you exactly, but the essence of it was he says that, I didn't make my money in Nashville and says, I made my money in Manchester and I am going to leave it in Manchester.

Q Do you recall him making a remark like that on at least two occasions.

A Yes, sir.

District Court Transcript, p. 697, attached hereto as Exhibit G.

It is important to note that the January 18, 1985, Will omitted all of King's closest friends and relations,

including Letha Rhodes, Freeman Macon, Hattie Biles, and Carolyn Higdon. In addition, there was no specific bequest to either of the churches with which King was affiliated.

The facts of this case distinguish it from Boyd v. Boyd, 680 S.W.2d 462 (Tenn. 1984). In the Boyd case, there was no testimony or evidence that Alvin Boyd exercised any sort of dominion or undue influence over the testatrix at any time near the execution of the Will. In the instant case, the affidavit of Carolyn Higdon contains evidence that Melba Lapidus did exercise dominion and undue influence in January 1985, and April 1985. This evidence, coupled with the other circumstances discussed above raise genuine issues of material fact which must be resolved by a jury.

In their Brief, the King Petitioners state, "Independent advice, of course, refutes any claim of undue influence", and cite the case of Askew v. Askew, 619 S.W.2d 384 (Tenn.App. 1985). Carolyn Higdon submits to the Court that that statement is not a correct statement of the holding in the Askew case. Furthermore, a Will can be invalidated on the ground of undue influence, even if the testator discussed the provisions with an attorney who then prepared the Will. The Askew case held that independent advice can be used to rebut the presumption of invalidity arising from the existence of a confidential relationship. Askew, 619 S.W.2d at 386. In addition, the mere fact that an attorney is involved in the preparation and execution of a Will does not automatically rule out the ground of

undue influence. In Mitchell v. Smith, 779 S.W.2d 384 (Tenn. App. 1989), the Will was held invalid on the ground of undue influence even though an attorney had prepared it. Factual issues remain regarding the circumstances surrounding the discussions, preparation, and execution of each of the three Wills, and these are jury issues.

Additional proof regarding the dominion or undue influence which Melba Lapidus or the King Petitioners exercised over King will be obtained in the discovery process and will be presented at trial. However, Carolyn Higdon has met her burden of establishing that genuine issues of material fact remain by designating affirmative evidence on the issue of undue influence. Therefore, the Motion for Summary Judgment should be overruled.

Carolyn Higdon is not judicially estopped from alleging that Dave King lacked testamentary capacity at the time he executed the Wills of January 18, 1985, and April 8, 1985. The doctrine of judicial estoppel applies only where there has been a willful misstatement of fact. Woods v. Woods, 638 S.W.2d 403 (Tenn. App. 1981). Carolyn Higdon has not made a willful misstatement of fact, and therefore, judicial estoppel does not apply. In the District Court hearing, Carolyn Higdon merely testified as to her opinion as a lay person as to King's mental state. In the Federal Court proceedings, Carolyn Higdon testified that in her opinion, King was competent in April 1985. The Co-Conservators introduced evidence, including testimony from Mr. King's treating physician, that Mr. King was incompetent and unable to

manage his business affairs from April 9, 1984, forward. Admittedly, Carolyn Higdon will not testify inconsistently with her previous testimony regarding her opinion as to Dave King's mental state. However, she is not judicially estopped from relying upon evidence introduced by the Co-Conservators in the Chancery and Federal Court proceedings or from introducing other evidence as to Dave King's mental competency in 1985.

In Woods v. Woods, 638 S.W.2d 403 (Tenn. App. 1985), the Court of Appeals held that the doctrine of judicial estoppel did not apply. Mrs. Woods filed a Complaint alleging that her marriage was void, because it had never been consummated. Prior to a hearing, her spouse died, and she dissented from the will and demanded a spouse's share. The Court of Appeals held that she was not

judicially estopped from asserting the position that she was legally married at the time of her husband's death even though she had filed a Complaint alleging the marriage was void. Likewise, Carolyn Higdon is not judicially estopped from raising the issue of testamentary capacity.

Clearly, genuine issues of material fact remain on the issue of whether Dave King lacked testamentary capacity when he executed the Wills of January 18, 1985, and April 8, 1985, and Summary Judgment is inappropriate.

The holographic Will propounded by Carolyn Higdon is admissible to probate. Tennessee Courts do not require a holographic Will to be dated in order for it to be valid. Although Carolyn Higdon cannot establish the exact date on which the holographic Will was executed, the

evidence establishes that the holographic Will was executed prior to April, 1984. The Wills of January 18, 1985, and April 8, 1985, do not revoke the holographic Will, if those two Wills are found to be invalid by a jury.

Therefore, the holographic Will is the valid Last Will of David King, since the Wills of January 18, 1985, and April 8, 1985, are invalid on the grounds of undue influence and/or lack of testamentary capacity. Dave King's estate should pass pursuant to the terms of his holographic Will.

The District Court Judge specifically declined to address any issue regarding whether any of the Wills were procured by undue influence. Amended District Court Order, p. 5, attached hereto as Exhibit H. In addition, the Court's holding is very

specific as to the time period within which he held that Mr. King was unduly influenced by the Higdons. The time period of January 31, 1985, through April 9, 1985, is after the execution of the holographic Will. Therefore, the District Court ruling has no effect on the admission of the holographic Will to probate.

CONCLUSION

Summary judgment is not appropriate in this case, because genuine issues of material fact remain on each issue raised by the King Petitioners, and they are not entitled to judgment as a matter of law. Based upon the foregoing, CAROLYN HIGDON respectfully requests the Court to overrule the Motion for Summary Judgment filed by the King Petitioners.

Respectfully submitted this 1st day of October, 1991.

ROGERS, RICHARDSON & DUNCAN

By: s/J. Stanley Rogers
J. Stanley Rogers

By: s/Doyle E. Richardson
Doyle E. Richardson
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel for all parties at interest in this cause by delivering a true and exact copy of said pleading to the offices of said counsel or by placing a true and exact copy of said pleading in the United States Mail, addressed to said counsel at his office with sufficient postage thereon to carry the same to its destination, as follows:

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Dr. David Burgos
Sarmiento, 1411
Capital Federal
Buenos Aires, Argentina

Messrs. Leon and Mauricio Kanoivicki
c/o Dean Funes, 2901
Cordoba Capital, Argentina

This 1st day of October, 1991.

ROGERS, RICHARDSON &
DUNCAN

By: s/J. Stanley Rogers

IN THE CIRCUIT COURT FOR THE
FOURTEENTH JUDICIAL DISTRICT,
AT MANCHESTER

NO. 24,954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

Defendant-Contestant.

AND

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

RESPONSE OF MAIN STREET CHURCH OF CHRIST TO SUMMARY JUDGMENT MOTION

COMES NOW, the Main Street Church of Christ, by and through its attorney and

for a response to the Summary Judgment Motion would show unto this Honorable Court the following:

I.

Actually, the motion itself addresses itself to Carolyn Higdon and would thereby not appear to require a response from the Main Street Church of Christ; however, since they are part of the litigation, in that a dismissing of the case of Carolyn Higdon would be adverse to its interest, since it also claims under the handwritten Will that the Main Street Church of Christ will proceed to respond.

II.

The Main Street Church of Christ adopts for its response hereto the pleadings and documents filed by attorneys for Carolyn Higdon.

III.

In addition, the Main Street Church of Christ would show that in its Motion for Summary Judgment, the King Petitioners contend that Summary Judgment should be granted because Carolyn Higdon is estopped to contend that Mr. King was incompetent when he executed the two Wills reported by the King Petitioners because in prior litigation, she contended that he was competent at such period. The Main Street Church of Christ would show to the Court that it was not a party to that prior litigation and has not taken such a position and that even if it should be held that Carolyn Higdon for some reason was estopped to claim that position, the Main Street Church of Christ is not estopped to make that contention.

RESPECTFULLY SUBMITTED,

ROBERT L. HUSKEY

s/Robert L. Huskey, by
Permission slb
Attorney for Main Street Church
of Christ

CERTIFICATE OF SERVICE

I, Robert L. Huskey, certify that I have hand delivered a copy of the foregoing pleading to counsel for Carolyn Higdon and to counsel for the King Petitioners on the 22nd day of October, 1991.

s/Robert L. Huskey, by
Permission slb
ROBERT L. HUSKEY

IN THE CIRCUIT COURT
FOR THE FOURTEENTH JUDICIAL DISTRICT
OF TENNESSEE, AT MANCHESTER,
PART II

NO. 24,954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

AND

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

MOTION TO ALTER, AMEND AND SET ASIDE

COMES NOW the Main Street Church of Christ, by and through its attorney of record, pursuant to Rule 59 of the Rules

of Civil Procedure and pursuant to any other rule or category applicable and would move this Honorable Court to alter, amend and set aside the Court's Order entered June 1, 1992, whereby this Honorable Court granted a Summary Judgment to Bettye Jean Green, Martin, King, Deborah Lapidus Fisher, Lisa Lapidus Cohen, and Barry Lapidus, hereinafter for reference to as the "Lapidus Group."

Counsel would not contend to the Court that this is the first time that he has ever had a Summary Judgment granted against him or his client; however, Counsel would show to the Court that to the best of his knowledge this is the first time he has ever had a Summary Judgment granted against him or his client when no Summary Judgment Motion was filed against them.

It is a fact that in August of 1991, the Lapidus Group did file a Motion for Summary Judgment against Carolyn Higdon. As the Court can readily see from the record the Main Street Church of Christ has an interest in Carolyn Higdon remaining in the litigation and being successful in the litigation. Counsel for the Main Street Church of Christ in response to that Motion filed a pleading which first off pointed out that the Motion only addressed itself to Carolyn Higdon and therefore didn't require response by the Main Street Church of Christ, but since the Church was a part of the litigation and that it was felt that dismissing Carolyn Higdon would be adverse to the Church's interest and since the Church also claims benefit under the handwritten will, we chose to likewise oppose the Motion for summary

Judgment and in that regard would adopt the response and pleadings filed by Carolyn Higdon. We go on further to point out that the Church was not party to the prior to the litigation referenced in the Motion for Summary Judgment and therefore in no way would be utilized to bar the Church's interest in this case.

The Court in its Order of June 1, pointed out that we adopted the position and pleading of Carolyn Higdon and that nothing new was added to raise a factual issue and therefore granted the Summary Judgment. The Court must consider that in that responsive pleading where the Church adopted the Higdon position it was addressing a Motion for Summary Judgment against Carolyn Higdon and Carolyn Higdon only. The Main Street Church of Christ was not required to go forward with anything at that time. However, Counsel

would show even though not required to go forward at that time that there were matters in the record that would raise a factual issue as to Mr. King's competence at the time of the execution of either of the January or April 1985 Wills, the two Wills which the Lapidus Group seeks to support. The effect of His Honor's ruling in relation to the Higdon Motion was that although she may have that evidence she is estopped to raise it because of her prior position taken in prior litigation. Thus, there is clearly evidence and proof for the Court to raise a factual issue of Mr. King's competence at the time he executed either of the Wills supported by the Lapidus Group but the Court has held Ms. Higdon can raise it but the Court has specifically held that that doesn't bar the Church of Christ from raising it and rightly so

because we weren't a party to the prior litigation.

Put simply for several reasons there's no reason to award a Summary Judgment against the Main Street Church of Christ in this case, the first being there was no Motion for Summary Judgment against it to start with, and the second being that if there were there's plenty of evidence in the record including the statements taken by Ms. Lapidus, of doctors to support her establishment of the conservatorship and the deposition of Dr. Kaplan all go to establish the incompetence of Mr. King when he executed those two Wills.

Therefore the Main Street Church of Christ through Counsel would respectfully request this Honorable Court to set aside totally its Order of June 1, 1992.

RESPECTFULLY SUBMITTED,

s/Robert L. Huskey

ROBERT L. HUSKEY

Attorney for
Main Street Church of
Christ

CERTIFICATE OF SERVICE

I, Robert L. Huskey, certify that I have served a copy of the foregoing pleading upon Ms. Higdon by mailing a copy of same to her attorneys of record, the firm of Rogers, Richardson & Duncan at 100 North Spring Street, Manchester, TN 37355, and also have served a copy of this pleading upon the Lapidus Group by mailing a copy of same to the Honorable William L. Harbison at Sherrard & Roe, 424 Church Street, Nashville, TN 373219, and also upon the Honorable George E. Barrett at Barrett, Johnston and Parsley, 217 Second Avenue North, Nashville, TN 37219, and also a copy of the Court appointed administrator, the Honorable James H. Henry, II, at Henry and McCord, 300 North Jackson, Tullahoma, TN 37388, all mailings first-class mail, postage prepaid, this the 8th day of June, 1992. Copy also sent to the Honorable Trial Judge.

s/Robert L. Huskey
ROBERT L. HUSKEY

IN THE CIRCUIT COURT FOR THE FOURTEENTH
JUDICIAL DISTRICT,
AT MANCHESTER, PART II

NO. 24,954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

Defendant-Contestant.

AND

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

KING PETITIONERS' MEMORANDUM IN OPPOSITION TO MOTION TO ALTER, AMEND AND SET ASIDE BY THE MAIN STREET CHURCH OF CHRIST

I. INTRODUCTION.

On June 1, 1992, the Court awarded summary judgment in this will contest against the Main Street Church of Christ (the "Church of Christ"). As the only remaining contestant to the January 18, 1985 will propounded by the King Petitioners, the Court held that the Church of Christ has failed to meet its burden of demonstrating the existence of material facts in dispute regarding David King's testamentary capacity when he executed the January 18, 1985 Will. Because the January 18, 1985 Will postdates the holographic will propounded by the Church of Christ, summary judgment against the Church of Christ was granted.

The Church of Christ has filed a Motion to Alter, Amend and Set Aside the Order granting summary judgment against it. The grounds for this motion are (1)

"there was no Motion for Summary Judgment against it to start with" and (2) "there's plenty of evidence in the record . . . to establish the incompetence of Mr. King when he executed [the January 18, 1985 and April 8, 1985 Wills]." Motion to Alter, Amend and Set Aside, at 3.

The motion of the Church of Christ is without merit and should be denied. Although the Church of Christ correctly notes that the King Petitioners' motion for summary judgment is against Carolyn Higdon, the motion also sought summary judgment "against the validity of the [holographic will] propounded by her." Motion for Summary Judgment, at 1. Recognizing that an adjudication against the validity of the holographic will "would be adverse to its interest, since it also claims under the [holographic

will]," the Church of Christ submitted its response to the motion for summary judgment on October 22, 1991.[1] Response to Motion for Summary Judgment, at 1.[2] This response adopts the proof introduced by Carolyn Higdon on the issue of Mr.

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[1] At the hearing on the King Petitioners' motion for summary judgment on October 22, 1991, a "Response of Main Street Church of Christ to Summary Judgment Motion" was submitted by counsel for Carolyn Higdon on behalf of the Church of Christ. This response "adopts for its response hereto the pleadings and documents filed by attorneys for Carolyn Higdon." Response to Motion for Summary Judgment, at 1. The Church of Christ, through statements of counsel for Carolyn Higdon, otherwise waived its right to appear and protect its position regarding the King Petitioners' motion for summary judgment. Copies of pages 2 and 3 from the transcript of this hearing are attached as **Exhibit 1**.

[2] Because the response was apparently not stamped "filed" by the Circuit Court Clerk, the King Petitioners hereby request, so that the record is clear, that it be filed nunc pro tunc to reflect a filing date of October 22, 1991.

King's testamentary capacity when he executed the January 18, 1985 Will.

As a matter of law, the Court held that the evidence in the record is insufficient to create a jury issue regarding Mr. King's testamentary capacity on January 18, 1985. June 1, 1992 Order, at 2. Although it has moved the Court to set aside the order of judgment against it, the Church of Christ has submitted no additional proof in support of its motion on the issue of Mr. King's testamentary capacity.[3]

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[3] The Church of Christ emphasizes in its motion that no motion for summary judgment was pending against it when the Court's Order was entered on June 1, 1992. This does not establish grounds to set aside the Order for two reasons. First, the King Petitioners' motion for summary judgment challenged the validity of the holographic will, and the Church of Christ has still failed to meet its burden under Rule 56 of establishing a genuine issue of material fact related to Mr. King's testamentary capacity when he subsequently executed the January 18,

Accordingly, the motion is nothing more than a motion to reconsider the Court's prior determination that a jury issue does not exist regarding the Church of Christ's reliance on the validity of the holographic will propounded by it. The Court's prior determination was correct, and this Memorandum is respectfully submitted in opposition to the Church of Christ's motion.

II. LEGAL ARGUMENT AND DISCUSSION.

The Church of Christ asserts in its motion that no motion for summary judgment had been filed against it when judgment was entered against in on June 1, 1992.[4] However, the King Petitioners'

1985 Will. Second, as a matter of law summary judgment may be granted by the Court sua sponte.

[4] To the extent counsel for the Church of Christ laments that "this is the first time he has ever had a Summary

motion for summary judgment also sought judgment "against the validity of the [holographic will] . . . ." Motion for Summary Judgment, at 1. As a proponent of the holographic will and a contestant to the January 18, 1985 Will that was executed by Mr. King after the holographic will, the Church of Christ therefore had a burden to demonstrate "by affidavits or as otherwise provided in [Tenn. R. Civ. P. 56], . . . specific facts showing that there is a genuine issue for trial. If he does not so

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Judgment granted against him or his client when no Summary Judgment Motion was filed against them," he fails to explain why he was compelled to file a response to the King Petitioners' motion for summary judgment which states that "since they [sic] are part of the litigation, in that a dismissing of the case of Carolyn Higdon would be adverse to its interest, since it also claims under the handwritten Will that the Main Street Church of Christ will proceed to respond." Response to Motion for Summary Judgment, at 1.

respond, summary judgment, if appropriate, shall be entered against him." Tenn. R. Civ. P. 56.05.

In its response to the King Petitioners' motion for summary judgment, and in support of its contention that the January 18, 1985 will should not revoke the holographic will because Mr. King lacked testamentary capacity on January 18, 1985, the Church of Christ adopted "the pleadings and documents filed by attorneys for Carolyn Higdon." Response to Motion for Summary Judgment, at 1. This evidence includes the entire record from the prior proceedings in the United States District Court for the Eastern District of Tennessee (the "District Court"), and the affidavit of Carolyn Higdon wherein she states that the holographic will was written and signed by Mr. King prior to January 18, 1985.

The Church of Christ has offered no additional evidence on the issue of Mr. King's testamentary capacity when he executed the January 18, 1985 Will.

After considering on behalf of the Church of Christ the evidence in the record relating to Mr. King's testamentary capacity on January 18, 1985, the Court concluded that such evidence is insufficient to create a jury issue. See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (a court's inquiry regarding summary judgment or directed verdict is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law). Specifically, the Court stated:

> Taking the entire record introduced by the proponent of the holographic will, Carolyn Higdon, and viewed by the Court from the standpoint of being introduced on behalf of the potential beneficiary, Main Street Church of Christ, the proof appears to be insufficient to present the issue to a jury. The record from prior hearings in federal proceedings is clear that the January 18, 1985 and April 8, 1985 wills were executed after the holographic will and there is no proof to the contrary in the present proceeding and no proof that David King lacked testamentary capacity at least at the time the January 18, 1985 will was executed.

June 1, 1992 Order, at 2.

The Court's conclusion is correct. Although the Church of Christ may contend that "there's plenty of evidence in the record . . . to establish the incompetence of Mr. King when he executed [the January 18, 1985 Will]," Motion, at 3, as a matter of law the District Court found Mr. King competent to manage his

business affairs prior to January 31, 1985. This judicial finding of competence from the District Court, coupled with the lack of evidence in the record supporting the Church of Christ's contention that Mr. King did not have testamentary capacity on January 18, 1985, warrants the granting of summary judgment against the Church of Christ.[5] The Church of Christ has failed to meet its burden under Rule 56 of the Tennessee Rules of Civil Procedure of showing that there is a genuine issue for trial.

The Church of Christ's contention that judgment against it should be set aside because no motion for summary

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[5] There have also been allegations in this will contest that Mr. King was unduly influenced by the King Petitioners when he executed the January 18, 1985 Will. To the extent the Church of Christ takes this position, there is also no evidence in the record to support this baseless allegation.

judgment had been filed against it is legally irrelevant. The Tennessee Supreme Court has held that, in the absence of a genuine issue of material fact, a trial judge may grant summary judgment in favor of a party even though that party has not filed a motion seeking summary judgment. See, e.g., Brewer v. Argo-Collier Truck Lines Corp., 592 S.W.2d 322, 326 (Tenn. 1979); Thomas v. Transport Ins. Co., 532 S.W.2d 263, 266 (Tenn. 1976). In Thomas, the court cited with approval the following statement from Moore's Federal Practice:

> Care should, of course, be taken by the district court to determine that the party against whom summary judgment is rendered had had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law.

Thomas, 532 S.W.2d at 266 (citing 6 J. Moore, Moore's Federal Practice, ¶ 56.12 (2d ed. 1985).

The issue, therefore, is whether the Church of Christ has had the opportunity to demonstrate that there is a genuine issue of material fact regarding Mr. King's testamentary capacity when he executed the January 18, 1985 Will. Because the Church of Christ relied upon the evidence submitted by Carolyn Higdon on this issue, and because no additional evidence was submitted by the Church of Christ to support its motion to alter, amend and set aside, the record to date is identical to the record prior to the entry of summary judgment against the Church of Christ on June 1, 1992. This record, as the Court correctly held, is insufficient to support the Church of Christ's contention that the holographic

will is the last will and testament of Mr. King, and therefore no issue exists to be submitted to the jury.

III. CONCLUSION.

The Church of Christ is unable to meet its burden of establishing that a genuine issue of material fact exists with regard to Mr. King's testamentary capacity when he executed the January 18, 1985 Will. Because it is undisputed that the January 18, 1985 Will postdates the holographic will propounded by the Church of Christ, the holographic will is revoked as a matter of law and summary judgment against the Church of Christ is warranted. The Church of Christ's motion to alter, amend and set aside this summary judgment is without merit and should be denied.

Respectfully submitted,

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s/L. Webb Campbell II
William L. Harbison (No. 7012)
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Attorneys for the King
Petitioners, Bettye Jean Green,
Martin King, Deborah Lapidus
Fisher, Lisa Lapidus Cohen, and
Barry Lapidus

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by U.S. Mail, postage prepaid, to J. Stanley Rogers and Doyle E. Richardson, Rogers, Richardson & Duncan, 100 North Spring Street, Manchester, Tennessee 37355, attorneys for Carolyn Higdon; Robert L. Huskey, P. O. Box 777, Manchester, Tennessee 37355; James H. Henry, Henry & McCord, P. O. Box 538, Tullahoma, Tennessee 37389; Michael I. Mossman, Eisenstein, Moses & Mossman, One Church Street, Suite 500, Nashville, Tennessee 37201-1607, and by Certified Mail, Return Receipt Requested, to Dr. David Burgos, Sarmiento, 1411, Capital Federal, Buenos Aires, Argentina; and Messrs. Leon and Mauricio Kanoivicki, c/o Dean Funes, 2901, Cordoba Capital, Argentina, this 29th day of June, 1992.

s/William L. Harbison by LWC
William L. Harbison

IN THE SUPREME COURT FOR THE
STATE OF TENNESSEE
AT NASHVILLE

COURT OF APPEALS
NO. 01A01-9209-CV-00369
Coffee Circuit No. 24954

BETTYE JEAN GREEN,
MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN, and
BARRY LAPIDUS,

Plaintiffs/Appellees,

VS.

CAROLYN HIGDON and
MAIN STREET CHURCH OF CHRIST,

Defendants/Appellants.

MOTION OF LEON KANOIVICKI AND MAURICIO KANOIVICKI TO INTERVENE

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT FOR THE
STATE OF TENNESSEE
AT NASHVILLE

COURT OF APPEALS
NO. 01A01-9209-CV-00369
Coffee Circuit No. 24954

BETTYE JEAN GREEN,
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MAIN STREET CHURCH OF CHRIST,

Defendants/Appellants.

MOTION OF LEON KANOIVICKI AND

MAURICIO KANOIVICKI TO INTERVENE

The undersigned requests oral argument on this motion.

1.LEON KANOIVICKI and MAURICIO KANOIVICKI, pursuant to Rule 22 of the Rules of Appellate Procedure respectfully move the Court for an order permitting

them to intervene and submit briefs in the captioned proceeding.

2.The KANOIVICKIS are now before the Court of Appeals of Tennessee, Middle Section of Nashville, in case number 01A01-9303-CV-00396, in which briefs have been filed, and the matter scheduled for oral argument on April 5, 1994. The issues presented in that matter now pending before the Court of Appeals are closely related to the issues now pending in the above-numbered proceeding, which is pending before the Supreme Court upon applications for permission to appeal, pursuant to Rule 11, filed in behalf of Appellants CAROLYN HIGDON and MAIN STREET CHURCH OF CHRIST.

3.David King, a resident of Coffee County, died December 3, 1990, following years of progressively worsening Alzheimers disease, necessitating the

appointment of a conservator for his approximate eight million dollars ($8,000,000.00) in assets in 1985. Mr. King left multiple wills, three of which were executed during a relatively brief period of time in early 1985.

4. The only relatives surviving David King are those cousins described as the Lapidus Group (BETTYE JEAN GREEN; MARTIN KING; DEBORAH LAPIDUS FISHER; LISA LAPIDUS COHEN; and BARRY LAPIDUS), and the KANOIVICKIS (LEON KANOIVICKI and MAURICIO KANOIVICKI), cousins of Mr. King who reside in Argentina. CAROLYN HIGDON was a close friend of David King. The MAIN STREET CHURCH OF CHRIST is involved in the matter as a beneficiary under one of the wills, and as an assignee of a portion of CAROLYN HIGDON'S potential interest in the estate. All of the above-named individuals are designated

beneficiaries in one or more of the wills executed by David King. The Lapidus Group and the KANOIVICKIS have contested a will which primarily favors CAROLYN HIGDON. CAROLYN HIGDON and the KANOIVICKIS have sought to contest a will which primarily favors the Lapidus Group.

5. No jury trial has ever occurred in any of the will contests, and the matters have progressed to the Court of Appeals following summary judgment rulings by Judge John Rollins in the Circuit Court of Coffee County. The KANOIVICKIS were not represented by counsel until after October, 1992, when an order was entered which granted summary judgment to the Lapidus Group (and against HIGDON and the CHURCH). That part of the case is now pending before this Court, following the Court of Appeals, ruling which affirmed Judge

Rollins' October, 1992 order. Although the KANOIVICKIS had not been represented by counsel prior to the entry of Judge Rollins' order, they had filed pro se pleadings in the matter, and had been recognized, by court order, as "contestants" in the Circuit Court will contest proceedings.

6. Through some very unusual, bizarre twists, the case has become procedurally entangled. The KANOIVICKIS, as movants in the present motion, respectfully insist that the matters require consolidation for an appropriate consideration, since all parties have not had an opportunity to adequately present their positions either at the trial level or at the Court of Appeals. Simply stated, the KANOIVICKIS respectfully insist that the original motions filed in behalf of the Lapidus Group before Judge

Rollins in 1991 started as one thing, and were concluded by the Court of Appeals, as a much different, and much more broad, form of relief.

7. Attached as Exhibit #1 to this motion is the brief of Appellants LEON and MAURICIO KANOIVICKI, now pending before the Court of Appeals at Nashville, and the reply brief filed in behalf of the Lapidus Group, (Exhibit 2) . As previously stated, that matter is scheduled for oral argument on April 5, 1994. Attachment 1 to the KANOIVICKI brief is the opinion of the Court of Appeals filed in appeal number 369 (not to be confused with the present appeal number of 396) which affirmed the order of Judge John W. Rollins on the Lapidus summary judgment application filed in 1991.

8. The important points are as follows:

A. When the Lapidus Group presented its summary judgment motion in October, 1992 (prior to the KANOIVICKIS retaining their lawyer for representation) the summary judgment motion sought relief only against CAROLYN HIGDON, and sought no finding that would affirmatively affect the KANOIVICKIS. Otherwise stated, the Lapidus Group asked Judge Rollins to grant summary judgment as to CAROLYN HIGDON, on grounds that she was estopped, by previous, unrelated court proceedings, from taking a position regarding Mr. King's competency which would be patently inconsistent with the previous position taken on that issue. The motion for summary judgment sought no specified relief against the KANOIVICKIS, and only requested that CAROLYN HIGDON h)e declared estopped from pursuing a position in the will contest which would be contrary to a previous position taken by her in federal court proceedings several years ago.

B. Curiously, as seen on page 12 of the Court of Appeals' decision, the granting of "summary judgment against Carolyn Higdon only" was declared a final judgment, but a subsequent order, entered June 1, 1992, involving the rights of the MAIN STREET CHURCH OF CHRIST through CAROLYN HIGDON, was never declared a final judgment. The

Court of Appeals notes, on page 12 the following:

"The judgment from which this appeal is prosecuted is not a final, appealable judgment because no disposition is made of the April 8, 1985 will . . . . It is debatable as to whether the partial judgment against the holographic will was properly declared final. Nevertheless, in view of the advanced stage of this appeal, the issues will be considered and resolved as upon extraordinary appeal."

That finding by the Court of Appeals had the procedural effect of completely divesting the KANOIVICKIS of any rights to be heard on the important issues pending before the Circuit Court of Coffee County.

C. on the basis of the foregoing finding by the Court of Appeals, the Court of Appeals thereafter treats the matter as an in rem resolution of all issues pertaining to the will contests, and enters certain findings regarding "all wills executed prior to January 18, 198511 (see page 26 of the opinion) effectively finding against the KANOIVICKIS, although the KANOIVICKIS had never had an opportunity to present any proof on those issues.

D. Because of their critical importance to the issues being discussed, two orders are attached for the Court's review in considering the

present motion. Attached as exhibit 3 to this motion is the "Final Order" entered following a hearing on October 9, 1992, at which time the trial court, in purportedly finally ruling on the summary judgment issues involving HIGDON and MAIN STREET CHURCH OF CHRIST found that "there are no longer any contestants before the Court." Exhibit 4 to this motion is very significant because it is an order of the Circuit Court entered March 27, 1991 that specifically recognizes LEON and MAURICIO KANOIVICKI as "participants" in the "trial of the will contests", and contemplates their "appearance at these proceedings."

E. The trial court entered the (Order recognizing the KANOIVICKIS as "participants" in the will contest, because they had filed in the Probate Court a detailed answer, translated from Spanish, which pointedly challenged the mental competency of David King as an Alzheimer's sufferer, and requested permission to participate in the contested proceedings. The record in the case will demonstrate that they were served with a solemn form petition in the Probate Court, and that they were forwarded notices in every stage of the Circuit Court will contest proceedings. The file will further reflect that the KANOIVICKIS retained counsel in October, 1992, and that the counsel for the KANOIVICKIS immediately filed additional pleadings at the Circuit Court level detailing

the nature of the KANOIVICKIS' objection to all wills propounded for probate. Based upon the trial court's October, 1992 finding that the summary judgment as to HIGDON and the CHURCH resolved all issues, the trial court then subsequently entered a summary judgment finding against the KANOIVICKIS stating that they had not timely entered into the proceedings to contest the wills.

9. If the decision of the Court of Appeals in the matter now pending for Rule 11 consideration stands, the KANOIVICKIS, having followed every appropriate procedural step to protect their rights, will have been denied an opportunity for a jury trial consideration of the will contest issues. Although the HIGDON/CHURCH summary judgment matters commenced in a motion which requested relief only as to HIGDON and MAIN STREET CHURCH OF CHRIST, the Court of Appeals' decision, which is now before this Court for review, had the effect of broadening the application of

that finding to an in rem conclusion of all will contest issues pertaining to every will except the April, 1985 will executed by Mr. King. The KANOIVICKIS did not intervene at the Court of Appeals, level because nothing pending before the Court of Appeals sought direct relief as to the KANOIVICKIS. In fact, the KANOIVICKIS agree that CAROLYN HIGDON should be estopped in the manner described in the summary judgment motion.

10. The legal authority recognizing the appropriateness of the KANOIVICKIS' intervention in the present appeal is well established:

> "But the general rule that only parties to the record can appeal does not apply in contested will cases, for the reason that the rights of persons interested in the estate, as heirs or distributees, devisees, or legatees, are settled conclusively by the result of the trial, whether they are named as parties or not. Consequently, all such persons as might have made the contest in the first instance are

entitled to intervene, if not already parties, and appeal the case." 5379 (Persons Entitled to Appeal), Pritchard on Wills and Administration of Estates, at page 480.

11. Thus, the KANOIVICKIS, having been served with a summons, and having filed a detailed answer contesting David King's mental competency as to all wills, and having participated in the proceedings below, are certainly in a greater procedural stature than the situation contemplated by the above reference in the Pritchard Treatise on Will Contests. Without the intervention of the Supreme Court in permitting the KANOIVICKI briefs to be considered along with the other pending briefs, the KANOIVICKIS may be deprived of any opportunity to be properly heard on the issues. Having been recognized, by order of the trial court, as participants in the will contest trial level proceedings,

the KANOIVICKIS, simply stated, have been procedurally cut from the picture by a ruling in the Court of Appeals that grants relief far beyond that requested by the summary judgment movants, and without any notice to the KANOIVICKIS that the Court of Appeals would treat the "non-final" orders as though the matter was an extraordinary appeal. That decision by the Court of Appeals, to broadly rule on all of the wills as an in rem finding, effectively denied the KANOIVIČKIS their day in court in a matter in which they had been served with process, and had properly answered.

12. Based upon the foregoing, MAURICIO KANOIVICKI and LEON KANOIVICKI, through their undersigned counsel, requests permission to intervene in the captioned matter, and requests that the legal authorities cited in the attached

brief be considered. Further, the KANOIVICKIS request that all of the matters involving the King Estate be consolidated for disposition before the Supreme Court and heard on oral argument.

Respectfully submitted,

s/Wm. Kennerly Burger
WM. KENNERLY BURGER, P.C.

Attorney for Leon Kanoivicki and Mauricio Kanoivicki
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(615) 896-4154

CERTIFICATE OF SERVICE

A true and exact copy of the foregoing has this date been mailed to the following: J. Stanley Rogers, Attorney at Law, ROGERS, RICHARDSON & DUNCAN, 100 N. Spring Street, Manchester, TN 37355; James H. Henry, II, Attorney at Law, HENRY & McCORD, P. 0. Box 538, Tullahoma, TN 37388; Robert L. Huskey, Attorney at Law, P. 0. Box 777, Manchester, TN 37355; Michael I. Mossman, Attorney at Law, EISENSTEIN, MOSES AND MOSSMAN, One Church Street, Suite 500, Nashville, TN 37201-1607; William K. Harbison, Attorney at Law, SHERRARD & ROE, 424 Church Street, Suite 2000, Nashville, TN 37219; H. Thomas Parsons, Attorney at Law, 101 W. Main Street, Manchester, TN 37355; George E. Barrett, Attorney at Law, BARRETT, JOHNSTON PARSLEY, 217 Second Avenue

North, Nashville, TN 37201; this 6th day of December, 1993.

s/Ken Burger
KEN BURGER

IN THE SUPREME COURT
FOR THE STATE OF TENNESSEE

AT NASHVILLE

COURT OF APPEALS
NO. 01A01-9209-CV-00396

Coffee Circuit No. 24954

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs/Appellees

VS.

CAROLYN HIGDON and
MAIN STREET CHURCH OF CHRIST

Defendants/Appellants.

PETITION TO REHEAR FILED IN BEHALF OF

LEON KANOIVICKI AND MAURICIO KANOIVICKI

1. The Court has entered an order denying the application for permission to appeal filed in behalf of the MAIN STREET CHURCH OF CHRIST and CAROLYN HIGDON, who are before the Court on an appeal from an order from the Circuit Court of Coffee County granting summary judgment to the

Lapidus Group in appeal number 00369. The undersigned, LEON KANOIVICKI and MAURICIO KANOIVICKI are cousins of David King (as are the members of the Lapidus Group), and have appealed from a separate summary judgment action in Coffee County Circuit Court, now pending before the Court of Appeals in case number 00396, which is now scheduled for oral argument before the Court of Appeals on Tuesday, April 5, 1994.

2. Because of the potential impact of the decision of the Court of Appeals in case number 369, the KANOIVICKIS filed a motion to intervene in that appeal, and requested that the application of HIGDON and the MAIN STREET CHURCH OF CHRIST be granted in order that some very important and difficult issues related to the estate be properly resolved. This court ruled on the application for permission

to appeal, denying the request, prior to consideration of the recently filed motion to intervene.

3. Simply stated, the position of the KANOIVICKIS is as follows:

> A. Prior to the KANOIVICKIS retaining counsel in the Coffee County circuit will contest case, the Lapidus Group filed a motion for summary judgment which sought dismissal of the claims of CAROLYN HIGDON and MAIN STREET CHURCH OF CHRIST, and upon grounds that HIGDON was judicially estopped from taking a position in the will contest which would be inconsistent with her position in previous litigation. Significantly, no affirmative relief was sought against the KANOIVICKIS. The problem arising for the KANOIVICKIS, upon the Court of Appeals granting its decision in case number 369, is that the appellate decision appears to grant relief significantly broader than that requested in the initial motion for summary judgment, and the order entered by Judge Rollins in granting the relief requested. If left to stand with its present wording, the decision of the Court of Appeals in appeal number 00369 may significantly impact upon the rights of the KANOIVICKIS, although the pleadings regarding the summary judgment motion, served upon them

prior to their employment of counsel, and decided prior to the employment of counsel at the trial level, will severely prejudice their rights in the remaining litigation.

B. The estate of David King involves an estimated eight million dollars ($8,000,000.00). The matter has become procedurally entangled at the trial level. The KANOIVICKIS, who are natives of the country of Argentina (and speak no English) have been recognized in a prior order entered by Judge Rollins as "participants" who are before the Circuit Court for the contemplated trial (a copy of that order is attached to the KANOIVICKIS brief and the later motion to intervene). A proper resolution of the difficult issues in the case require the consolidation of the two appeals before the Supreme Court, and a full hearing on the merits of the parties' respective arguments.

C. The trial record reveals patent inconsistencies. The attached order of 3/14/91 acknowledges that the Kanoivickis are "participants" in the "will contest" and contemplates their "appearance at these proceedings." The attached order of 10/20/92 states that there are "no longer any contestants before the court." The court's order of 5/27/92, granting summary judgment and overruling Higdon's motion to alter and amend states: "<u>The court's decision has no effect on the</u>

remaining parties to this action." (emphasis added, see page 10 of the appellate decision in case number 369). However, the decision of the Court of Appeals, in sustaining the granting of summary judgment in the first appeal, states: "On this issue, the judgment need not be for or against a party, but for or against the propounded will." (page 23, decision of the Court of Appeals in case number 369)

Respectfully submitted,

WM. KENNERLY BURGER, P.C.

s/Ken Burger

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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing has this date been mailed to the following: J. Stanley Rogers, Attorney at Law, ROGERS, RICHARDSON & DUNCAN, 100 N. Spring Street, Manchester, TN 37355; James H. Henry, II, Attorney at Law, HENRY & McCORD, P. 0. Box 538, Tullahoma, TN 37388; Robert L. Huskey, Attorney at Law, P. 0. Box 777, Manchester, TN 37355; Michael I. Mossman, Attorney at Law, EISENSTEIN, MOSES AND MOSSMAN, One Church Street, Suite 500, Nashville, TN 37201-1607; William K. Harbison, Attorney at Law, SHERRARD & ROE, 424 Church Street, Suite 2000, Nashville, TN 37219, H. Thomas Parsons, Attorney at Law, 101 W. Main Street, Manchester, TN 37355; George E. Barrett, Attorney at Law, BARRETT, JOHNSTON PARSLEY, 217 Second Avenue North,

Nashville, TN 37201; this 13th day of December, 1993.

s/Ken Burger
KEN BURGER

IN THE CIRCUIT COURT
FOR THE 14TH JUDICIAL DISTRICT
OF TENNESSEE
SITTING AT MANCHESTER, PART II

CIVIL ACTION NO. 24954
JURY DEMAND

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDEN,

Defendant-Contestant,

AND

CAROLYN HIGDEN,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

**ANSWER AND STATEMENT OF CONTEST
BY MAURICIO KANOIVICKI AND
LEON KANOIVICKI, AS INTESTATE HEIRS
OF THE ESTATE OF DAVID KING**

1. MAURICIO KANOIVICKI and LEON KANOIVICKI have previously been served with process in the solemn form probate proceeding, certified to the Circuit Court in the captioned proceeding. MAURICIO KANOIVICKI and LEON KANOIVICKI assert standing to challenge the testamentary documents purportedly executed as the Last Will and Testament of DAVID (DAVE) KING, upon the assertion that, as nephews of DAVID KING, they would constitute heirs at law, pursuant to the provisions of Tennessee Code Annotated, §31-2-104(b)(3) upon a finding by the Court that DAVID KING died intestate.

2. MAURICIO KANOIVICKI and LEON KANOIVICKI (hereinafter "the KANOIVICKI'S") assert that DAVID KING executed a testamentary document, purporting to be his Last Will and

Testament, on April 9, 1985, and that no other testamentary document was executed after that date. The KANOIVICKI'S assert that execution of the document on April 9, 1985 had the effect of revoking the prior alleged wills dated April 8, 1985; January 18, 1985; and the undated holographic will, based on the provisions of Tennessee Code Annotated, §32-1-201(1). The KANOIVICKI'S further assert that the decedent DAVID KING, manifested an intention to revoke all previously executed testamentary instruments by his efforts to procure the April 9, 1985 will. The KANOIVICKI'S further assert that DAVID KING thereafter validly and lawfully revoked the April 9, 1985 instrument by physically destroying the document in the presence of the attorney who had prepared it, evidencing an intention that the estate pass according

to the intestate laws of the state. The KANOIVICKI'S plead the inapplicability of the doctrine of dependent relative revocation in view of the decedent's failure to undertake, over a period of months prior to his death, any efforts to destroy other documents known by him to exist, or to clarify any position of priority.

3. The KANOIVICKI'S plead in the alternative, pursuant to Rule 8 of the Tennessee Rules of Civil Procedure, the absence of testamentary capacity of DAVID KING in the execution of the April 9, 1985 will; the April 8, 1985 will; the January 18, 1985 will; and the undated holographic will. In support of the conclusion of testamentary incapacity, the KANOIVICKI heirs assert the following salient facts:

A. At the time of the execution of the each of the instruments now before the Court, DAVID KING was of advanced age, and in a condition of advanced mental degeneration and advanced senility, manifesting disorientation, and rendering him incapable of forming a valid testamentary thought. The decedent was accordingly not qualified or competent to make a will, within the meaning of T.C.A. §32-1-102.

B. The instruments now before the Court were executed over a relatively brief period of time, following a medically documented period of mental degeneration by DAVID KING. Following the execution of the last instrument on April 9, 1985, which was subsequently revoked by destruction, a period of several months elapsed prior to the death of DAVID KING. During the passage of that substantial time, DAVID KING manifested no conduct, which would be indicative of lucid, formative testamentary capacity, which would have been directed toward expressing a position of priority as to the apparently known, existing instruments. The chronic and progressive mental debilitation of DAVID KING culminated in the commencement of a conservatorship proceeding in the Chancery Court of Coffee County in April, 1985, in which relatives and associates of DAVID KING attesting to his inability to manage his personal affairs, much of which was

predicated upon observations regarding DAVID KING'S confusion and disorientation. Those allegations were sustained by the Court, which appointed a guardian ad litem to act as legal representative for DAVID KING, and further appointed niece Melba Lapidus as conservator of the assets of DAVID KING.

4. Further, pleading in the alternative, the KANOIVICKI'S assert the invalidity of the instruments before the Court on grounds that each instrument: (a) was procured by the undue influence upon the decedent's testamentary act; and/or (b) that a confidential relationship existed between one or more of the primary beneficiaries, creating a presumption of invalidity in the absence of independent advice.

A. Specifically, as to the purported holographic will of DAVID KING which designates CAROLYN HIGDEN as primary beneficiary it is asserted by the KANOIVICKI'S that CAROLYN HIGDEN, as beneficiary of the instrument, exerted such compelling influence upon the testamentary act of executing the

document as to deprive the maker, DAVID KING, of his own volition and intent.

B. The KANOIVICKI'S assert, with regard to the instruments of January 18, 1985 and April 8, 1985, that, although executed by DAVID KING'S personal counsel, the documents were prepared in the context of diminished mental capacity, and under circumstances where the King heirs (designated as residuary legatees) were closely involved in the affairs of DAVID KING, and under general circumstances which would shift the burden of proof to the King heirs in demonstrating the absence of a confidential relationship, or a clear showing of independent advice in expressing the contents of the wills.

5. Based upon the foregoing Defendants MAURICIO KANOIVICKI and LEON KANOIVICKI deny the validity of any testamentary instrument executed by DAVID KING, and allege that the estate of DAVID KING must be divided according to the intestate laws of the State of Tennessee, as set forth in Tennessee Code Annotated, §31-2-104(b)(3). Defendants KANOIVICKI demand a

jury of twelve persons for the trial of the issues now before the Court pursuant to T.C.A. §32-4-107.

Respectfully submitted,

WM. KENNERLY BURGER, P.C.

s/Ken Burger

KEN BURGER, BPR #3731
Attorney for Mauricio Kanoivicki
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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing has this date been mailed to the following: J. Stanley Rogers, Attorney at Law, ROGERS, RICHARDSON & DUNCAN, 100 N. Spring Street, Manchester, TN 37355; James H. Henry, II, Attorney at Law, HENRY & McCORD, P. O. Box 538, Tullahoma, TN 37388; Robert L. Huskey, Attorney at Law, P. O. Box 777, Manchester, TN 37355; Michael I. Mossman, Attorney at Law, EISENSTEIN, MOSES AND MOSSMAN, One Church Street, Suite 500, Nashville, TN 37201-1607; William L. Harbison, Attorney at Law, SHERRARD & ROE, 424 Church Street, Suite 2000, Nashville, TN 37219; H. Thomas Parsons, Attorney at Law, 101 W. Main Street, Manchester, TN 37355; George E. Barrett, Attorney at Law, BARRETT, JOHNSTON & PARSLEY, 217 Second Avenue North,

Nashville, TN 37201; and Dr. David Burgos Sarmiento, 1411 Capital Federal, Buenos Aires, Argentina, this the 9th day of November, 1992.

s/Ken Burger
KEN BURGER

IN THE CIRCUIT COURT
FOR THE 14TH JUDICIAL DISTRICT
OF TENNESSEE

SITTING AT MANCHESTER, PART II

NO. 24954
JURY DEMAND

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
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Plaintiffs-Proponents,

VS.

CAROLYN HIGDON,

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Plaintiff-Proponent,

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BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Defendants-Contestants.

RESPONSE OF MAURICIO KANOIVICKI AND LEON KANOIVICKI TO KING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

1. INTRODUCTION:

Summary judgment is inappropriate under the requirements of Rule 56 of the Tennessee Rules of Civil Procedure. Genuine issues of material fact exist, and certain statutory requirements, which cannot be waived, have not yet been satisfied.

Simply stated, the Petitioners elected to probate the disputed will in solemn form. Process was issued as required by Rule 3 of the Tennessee Rules of Civil Procedure, and service effected against the Respondents. The Respondents answered, and specifically denied the validity of the wills. The KANOIVICKIS requested notice of the trial date. No motion for judgment by default against the KANOIVICKI Respondents has ever been requested or granted. The KANOIVICKI Respondents has ever been requested or

granted. The KANOIVICKI Respondents have been awaiting a trial date on the issues, and have been served with no notice of that date. Upon employment of counsel, a statement of contest was filed stating with particularity the grounds of contest asserted by the KANOIVICKI Respondents. That statement is necessary to properly frame the issues. Significantly, the statutory requirements for (1) oral presentation of the attesting witnesses proof and (2) the trial court's framing of the issues have never been met, and are not even mentioned in the Petitioner's summary judgment motion.

2. ARGUMENT AND SUMMARY OF THE LAW:

A. Introduction:

The procedural history commencing on page 2 of the motion for summary judgment

generally describes with accuracy the progress of the matter to date.

The Respondents object to these portions of the Petitioner's affidavits which would constitute hearsay, or testimony by Petitioner's counsel, as being contrary to the requirements of Rule 56.05 requiring that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Further, Respondents strenuously disagree with the factual statement, on page 3 of the motion that "the will contest had been concluded in October, 1992." As will be outlined in greater detail below, it was procedurally impossible for the will contest to have

been concluded on that date. Further, Petitioners misperceive the Respondents' procedural standing in the matter by characterizing it as an "attempt to intervene" (petition page 4).

B. Argument overview:

The basic thrust of the Petitioner's request for summary judgment to be predicated on two legal points: (1) That the KANOIVICKIS are somehow bound by the "final order" purportedly entered in the will contest; and (2) Their "attempt to intervene" is not timely. A substantial portion of the legal authority cited in support of the foregoing conclusions addresses the finality of a properly concluded, final judgment in its solemn will form contest. Respondent's position, on both points, is that the authority cited correctly summarizes the law on those legal propositions.

However, those propositions have no applicability to the present case.

C. Procedural requirements for probate in solemn form:

The KING Petitioners opted to present the will in solemn form by issuance of process, with service of notice of probate on all interested persons. The procedural requirements are outlined in §328 through §337 of Pritchard on Wills and Administration of Estates, 4th Edition. Once the matter is certified to Circuit Court for trial the trial court must frame the issues, which thereafter are considered by the trier of fact, and the matter is conducted according to the requirements of the Tennessee Rules of Civil Procedure.

It is admitted that the KANOIVICKIS were served with process in the probate proceeding shortly after the petition in

solemn form was filed on December 7, 1990. An informally drafted "answer" was filed in the probate court by the Respondents, acknowledging receipt of the process. Their answer requests additional time due to the translation difficulties, and requests an opportunity to be notified of a hearing date "not before the 30th of March, 1991." The Respondent's answer states that they "challenge said wills, as much regarding their content as well as their form, and emphasize, that before deciding which testament is valid, it will be necessary for the court to establish whether David King had use of his full mental faculties, and whether he was capable of declaring a final will and testament." (see attachment #1)

On January 17, 1991 the Probate (Chancery) Court certified a will contest

to Coffee County Circuit Court, where the matter has remained, pending a final trial date.

> "Will contests traditionally have been initiated by the filing of a petition. Rule 3 of the Tennessee Rules of Civil Procedure provides that all civil actions are to be commenced by filing a complaint." Pritchard, §354, at page 459.

The filing of an answer, pursuant to Rule 8 of the Tennessee Rules of Civil Procedure, places the case at issue, and precludes the granting of a judgment by default. No motion for judgment by default has been filed against the KANOIVICKI Respondents, pursuant to Rule 55 of the Tennessee Rules of Civil Procedure. It is admitted in the Petitioner's motion for summary judgment that no notice of a trial on the issues has been forwarded to the KANOIVICKI Respondents.

The Petitioner's motion overlooks a salient, unwaivable requirement: Once the matter has been transferred to Circuit Court for trial of the will contest, the Court must "make up the issue" as discussed in §366 of the Pritchard treatise, at page 470.

> "No particular form of issue is required; all that is necessary is to show that the will is propounded and averred to the be the last will of the decedent, on the one hand, and that the affirmation is denied on the other. If the contestant chooses, for the purpose of saving costs or for any other reason, to limit the contest to any particular clause, thus admitting and putting out of dispute the balance of the will, he may have the right to do so. But a general denial of the plaintiff's affirmation that the paper is the will of the decedent brings the will as a whole, and every part of it, into contest. If, therefore, the contestant files a general denial, and also pleads specially, the court properly may strike out the special

> pleas." Pritchard, §366, at page 470.

The foregoing Pritchard discussion emphasizes the right of a contestant to amend the pleading filed in Probate Court, without remand of the matter to the Probate Court for that purpose (see page 471).

Most significantly, Tennessee Code Annotated, §32-2-104 precludes any disposition of the will contest, by summary judgment or otherwise, which would not bring into the open court, for live testimony, the purported witnesses to the contested document. That requirement is not waivable in a solemn form proceeding, and may not be avoided by summary judgment application:

> "The statute is silent on the subject of proof of wills in the probate court in solemn form, but by implication, conformably to the practice int he ecclesiastical courts,

> requires that all the subscribing witnesses to be found should give testimony to establish a written will with witnesses in solemn form, even when no opposition is interposed.... Unless and until there is a reported decision to the contrary, it appears that all witnesses who are available must be examined in person even though they have executed affidavits pursuant to T.C.A. §32-211." Pritchard, §332, at page 434. (Emphasis added)

In a will contest which was resolved by summary judgment, that mandatory requirement was lessened somewhat by the allowance of a deposition, but only after the opportunity to cross-examine:

> "It is unnecessary, in every instance, for the proponent to offer the live testimony of the available attesting witnesses. This court has held that Tennessee Code Annotated, §32-2-104(a) is satisfied if the testimony of the attesting witnesses is preserved by deposition, after the contestants have been given the opportunity to cross-examine. Swindoll v. Jones, 41 Tenn. App. 89, 109-10, 292 S.W.2d 531, 541 (1954). Tennessee

> Code Annotated, §32-2-104(b) authorizes the trial court, in its discretion, to accept and use an attesting witness' deposition in lieu of live testimony, if it determines that the witness is 'unable to testify in person.' Witness unavailability is for the trial court to decide, and its determination will not be set aside when the contestants have acquiesced in the proof concerning the manner in which the will was executed. (citing Lyman v. American National Bank & Trust, 346 S.W.2d 289, at page 291 (1960)). Owen v. Stanley, 739 S.W.2d 782 (Tenn. App. 1987).

D. Procedural deficiencies in the above-summarized requirements:

It is not even suggested in the Petitioner's motion for summary judgment that the foregoing procedural requirements have been satisfied. First, no "final order" has been entered, as a matter of law. The "final judgment" by the express terms of the October 22, 1991 order, is made referable only to CAROLYN

HIGDEN, and no other parties in the litigation. Second, once the matter is certified to Circuit Court for contest, the matter is not finalized until the hearing is conducted with the attesting witnesses, and the issues framed. The Circuit Court finding becomes the last procedural step to probate:

> "If the contest was begun before probate in common form in the probate court, the decision of the issue in the circuit court is of itself a probate of the will, in solemn form, or else an adjudication that the paper is no will and cannot be admitted to probate. In any event, therefore, no re-probate takes place int eh probate court: The only duty that court has to perform is to record the certificate of the verdict and the judgment, and the original will, if established." Pritchard, §382, at page 483.

Accordingly, Owen and the above authorities stand for the proposition that summary judgment may be appropriate

in a will contest proceeding, but only if the requirement for testimony of the witnesses has been satisfied by use of depositions, with the opportunity for the contestants to cross-examine.

E. The issues of fact pertaining to proper attestation as well as the competency of the decedent must be submitted to a jury:

Petitioners have requested a jury. Rule 38 of the Tennessee Rules of Civil Procedure provides that after any party has made a request for a jury demand, that demand may not be withdrawn "without the consent of all parties as to whom issues have been joined." Rule 38 therefore mandates that the issue of statutory proof, required by T.C.A. §32-2-104 be submitted to a jury, rendering summary judgment procedurally unavailable. (Also see Pritchard, §367,

at page 471 which applies the Tennessee Rules of Civil Procedure to will contests, in the context of jury issues.) The disposition as to CAROLYN HIGDEN and MAIN STREET CHURCH OF CHRIST in no way modifies that requirement, after the KANOIVICKIS have appeared and made known their objections to the will:

> "But a general denial of the plaintiff's affirmation that the paper is the will of the decedent brings the will as a whole, and every part of it, into contest." Pritchard, §366 at page 470.

That is particularly true where other wills of the decedent may be at issue.

> ". . . being a proceeding in rem, it is proper to permit the propounding of other wills than the one first offered for probate, and against which a contest was instituted, so that the jury may determine which of the papers is the true will of the decedent." Pritchard, §341, at 447.

F. That portion of the Plaintiff's memorandum which addresses the issue of "intervention" is inapplicable to the case.

What authority supports the conclusion that the Respondent KANOIVICKIS, having been served with process pursuant to Rule 3 of the Tennessee Rules of Civil Procedure, would need to "intervene", within the meaning of Rule 24 of the Tennessee Rules of Civil Procedure?

Had the Respondents not been served with process, and answered, they would have the procedural right to petition to intervene in the present matter, as discussed in §331, at page 433, of the Pritchard treatise on wills. In that event, the Respondent's application would be governed by Rule 24 of the Tennessee Rules of Civil Procedure, and all of the

authority discussed on pages 7 and 8 of the Petitioner's memorandum might be appropriately considered. Simply stated, the KANOIVICKI Respondents are before the Court by process in a case that has been placed at issue, and no cited authority supports the conclusion that they are required to further intervene.

G. Res Judicata has no applicability to the Respondents:

The Petitioners incorrectly attempt to rely upon res judicata or collateral estoppel in asserting that the April 9, 1985 will is invalid, as a matter of law. Petitioners attempt to support that finding by arguing that the finding of the United States District Court, in a separate proceeding not involving the KANOIVICKIS in 1988, determined that CAROLYN HIGDEN, a beneficiary, was guilty of undue influence. Obviously, since the

KANOIVICKIS were not parties to the proceeding, and the issues were not identical, neither collateral estoppel or res judicata would be applicable:

> "The defendant contends that the present litigation is barred by the doctrine of res judicata because the parties herein were both included in a will contest dated October 21, 1982. Res Judicata operates as a bar to a second suit between the same parties and their privies as to the same cause of action and as to all issues which were or could have been brought in the former suit. Whitley v. Reeves, 39 Tenn. App. 169, 281 S.W.2d 411 (1955); Lillard v. Yellow Manufacturing Acceptance Corp., 195 Tenn. 686, 263 S.W.2d 520 (1954); 22 Tennessee Jurisprudence Res Judicata at page 4 (1985). As we have noted, the former will contest was dismissed with prejudice. A dismissal operates as an adjudication on the merits and serves as a bar to a suit for relief on the same subject matter. See; T.R.C.P. 41.02(3)." Stacks v. Saunders, 812 S.W.2d 587 (Tenn. App. 1990).

Since it is not even asserted by the KING Petitioners that the KANOIVICKIS were involved in that proceeding, or that the issues were identical, those findings have no bearing on the KANOIVICKIS position in the will contest now being considered by the Court.

H. Genuine issues of material fact exist on the question of the decedent's testamentary capacity:

It is factually undisputed that the decedent, DAVID KING, suffered from Alzheimer's and dementia during the general time frame in which all of the alleged wills were executed. The KING Petitioners, in the federal court proceedings and in the conservatorship, vigorously asserted the position, in behalf of the LAPIDUS family that MR. KING was "totally incapable of making any important decisions", and that he had

been in that condition for "at least a year" prior to the commencement of the conservatorship proceedings. Curiously, the LAPIDUS family and the HIGDONS have found themselves in a reversal of roles on the competency issue.

Aside from the obvious estoppel difficulties which the KING Petitioners will encounter at the trial of the matter, those words have significance in evaluating their present summary judgment application.

When MELBA KING LAPIDUS filed her "Verified Petition for Appointment of Conservator" on April 16, 1985, she alleged, under oath, the following (see attachment #2) matters about DAVID KING:

a. That he was, at the time, "in an incompetent state of mind due to his advanced age."

b. That he was, at that time, "totally incapable of making any important decisions. . . ."

c. That he was, at that time, "severely confused and disoriented from a chronic brain syndrome and requires an attendant around the clock."

d. That he was, at that time, "completely disoriented and confused. . . ."

Significantly (in the context of evaluating the decedent's ability to remember what his assets were, and the identity of his purported beneficiaries) reports filed by the conservators six (6) months later in support of their pending issues, indicated the following (see Exhibit 3):

a. "His recent memory was grossly impaired".

b. On November 18, 1985, Mr. King thought the date was December 25, 1988, and that his birthdate was 1973.

c. "He could not retain two sentences over five minutes."

d. He was "functioning at approximately the same level as six months ago."

Judicial estoppel precludes the "KING Petitioners" from taking a position in the will contest which would dispute the foregoing allegations in earlier litigation. Gilley v. Jernigan, 597 S.W.2d 313 (Tenn. App. 1979).

> "This court has succinctly described the contestants' burden of proof as follows: Where, however, the contestant shows the existence of suspicious circumstances such as a confidential relationship in combination with the beneficiary's involvement in procuring the will, OR (emphasis ours) in combination with impairment of the testator's mental capacity, there arises a presumption of fraud or undue influence which the proponent of the will must overcome by a preponderance of the evidence." Owen v. Stanley, 739 S.W.2d 782, at page (Tenn. App. 1987).

It is conceded by the Respondents that the mere appointment of a

conservator does not alone remove testamentary capacity. However, §369 of Pritchard, at page 473, notes that "in cases of doubtful capacity . . . the burden is upon the proponent to satisfy the minds of the jury that the testator was not imposed upon and that he had knowledge of the contents of the instrument, and executed it freely and understandingly, with testamentary intent." The issue is purely one of fact, to be determined by the trier of fact. While the pendency of the conservatorship does not per se remove testamentary capacity, it may be considered as evidence of incapacity, along with other evidence. Harper v. Watkins, 670 S.W.2d 611 (Tenn. App. 1983).

Where mental debilitation is shown to have existed at some point prior the

execution of the proposed will, "the presumption of the law that it continues, unless the malady or delusion under which the testator labored was, in its nature, accident and temporary, and the burden of showing capacity at the time of the execution of the will is shifted upon the party insisting upon its validity. Where the evidence leaves it doubtful whether or not sufficient capacity existed, the burden of removing the doubt is upon the proponents." Pritchard, §104, at page 151. Bruster v. Etheridge, 345 S.W.2d 692, at page 699 (1960); Bank of Commerce & Trust Co. v. Stavros, 103 S.W.2d 593 (1936); Harper v. Watkins, 670 S.W.2d 611 (Tenn. App. 1983); In Re: Estate of Elam, 738 S.W.2d 169 (Tenn. 1987).

Issues of fact exist regarding the testamentary capacity of DAVID KING. Submitted as an attachment to this

response is the affidavit of Dr. Ravi Singh, M.D., M.P.H., a psychiatrist specializing in geriatric services. As an expert in the treatment and evaluation of organic brain diseases (including alzheimer's) in the elderly, Dr. Singh has reviewed all of the medical records of DAVID KING, including depositions taken in prior litigation in which the decedent's competency was at issue. Dr. Singh's opinion is that DAVID KING unquestionably lacked testamentary capacity for the period after April, 1984 and until his death, and probably for at least <u>many months</u> prior to 1984. Dr. Singh opines that, due to the advancing organic brain disease, it was not possible for MR. KING, after April, 1984, to understand the nature of his purported testamentary act, due to grossly disfunctional memory; disorientation as

to time, place and person; delusional thoughts; irrational reasoning processes; and general mental confusion and dementia.

Further, where circumstances such as age and mental infirmity are shown, the presumption arises that the decedent is unduly influenced in any dealings where a beneficiary assists in the procuring of a will.

> ". . .it is for the jury to judge whether or not any influence was exercised on the occasion of making the will; if so, whether it was by fair and reasonable means, or by unfair or fraudulent means, and whether or not it was sufficient to void the will and decide accordingly." Pritchard, §150 at page 202; Taliferrow v. Green, 622 S.W.2d 829 (Tenn. App. 1981).

Only in cases where "the contestants came forward with no proof on either the undue influence or the lack of testamentary capacity issues" would it be

appropriate for the court to grant summary judgment. Where the proof is before the court, undisputed, that MR. KING was aged and mentally infirmed (and, as Petitioner's stated in previous litigation, "totally incapable of making any important decisions") the matter should be submitted to the jury for full consideration.

I. The summary judgment application must establish the "KING Petitioners" standing:

Further, it should be parenthetically noted that nowhere in the motion for summary judgment, nor the attached affidavits, is the standing of the named "KING Petitioners, demonstrated. Before summary judgment could be considered appropriate, an affidavit establishing the right of

BETTYE JEAN GREENE; MARTIN KING; DEBORAH LAPIDUS FISHER; LISA LAPIDUS COHEN; and BARRY LAPIDUS must be demonstrated, and made referable to the named beneficiaries in the will proposed for probate. Otherwise stated, it may not be assumed, for purposes of the present proceeding, that those individuals have rights through MELBA LAPIDUS. The source of their interest must be described with specificity. The failure to outline the entitlement through which they claim raises an issue of fact that must be considered by the Court.

> "The co-administrator defendants' affidavits do not resolve the issue of whether the plaintiffs acquired any interest by intestate succession from A. J. Tucker, nor do they resolve the issue of whether the property described in the complaint was the property of Nell Tucker. The affidavits do say the handwriting and signature in the holographic will of Nell

Tucker was her last will and testament. In effect, we are asked to make that determination in the absence of an explanation in the sparse record." Goss, et al v. Priest, et al, Court of Appeals, Eastern Section, filed February 27, 1990, copy attached.

7. SUMMARY:

(1) An evaluation of Byrd v. Hall (S.Ct. July 19, 1993) demonstrates that genuine issues of material fact exist.

(2) The KING Petitioners misperceive the procedural status of the case. The KANOIVICKIS were served, answered and have awaited a trial date.

(3) Where the attesting witnesses have not testified in person, or by deposition, summary judgment may not even be considered.

(4) The burden of proof is on the KING Petitioners that demonstrate that no

genuine issues of material fact exist. The admissions regarding his mental incompetency, and the presumptive continuation, preclude the granting of summary judgment.

(5) Summary judgment is procedurally improper and cannot be granted prior to the issues being framed by the trial court as required by Tennessee Code Annotated, §32-4-104. Reynolds v. Day, 792 S.W.2d 924 (Tenn. App. 1990); Carty v. Patton, (copy attached)

For the foregoing reasons, summary judgment is inappropriate, and the motion should be denied.

Respectfully submitted,

WM. KENNERLY BURGER, P.C.

s/Ken Burger

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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing has this date been mailed to the following: J. Stanley Rogers, Attorney at Law, ROGERS, RICHARDSON & DUNCAN, 100 N. Spring Street, Manchester, TN 37355; James H. Henry, II, Attorney at Law, HENRY & McCORD, P.O. Box 538, Tullahoma, TN 37388; Robert L. Huskey, Attorney at Law, P.O. Box 777, Manchester, TN 37355; Michael I. Mossman, Attorney at Law, EISENSTEIN, MOSES AND MOSSMAN, One Church Street, Suite 500,

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s/Ken Burger

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

NO. 01A01-9309-CV-00396

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDEN, LEON KANOIVICKI,
and MAURICIO KANOIVICKI,

Defendants-Contestants,

AND

CAROLYN HIGDEN,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KIND,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,
LEON KANOIVICKI, and MAURICIO KANOIVICKI,

Defendants-Contestants.

BRIEF OF APPELLANTS LEON KANOIVICKI AND MAURICIO KANOIVICKI

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IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

NO. 01A01-9309-CV-00396

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
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DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,
LEON KANOIVICKI, and MAURICIO KANOIVICKI,

Defendants-Contestants.

BRIEF OF APPELLANTS LEON KANOIVICKI AND

MAURICIO KANOIVICKI

I. INTRODUCTION:

Decedent, David King, an elderly Alzheimer's patient who had been the subject of a conservatorship proceeding since 1985, died in Coffee County, Tennessee on December 3, 1990, leaving multiple wills. His heirs-at-law at the time of his death include certain members of the LAPIDUS family (the LAPIDUS group), who are cousins, and two Argentinean nationals, brothers MAURICIO KANOIVICKI and LEON KANOIVICKI, who were also cousins of David King. The wills offered for probate following Mr. King's death included a handwritten, undated instrument, which purported to leave most of estate to a friend named CAROLYN HIGDEN. That instrument was offered for probate in common form by MS. HIGDEN, and was contested by the LAPIDUS group. Two formal instruments, dated in January,

1985 and April, 1985, were offered for probate by the LAPIDUS cousins, with the solemn form procedure being followed. Prior litigation involving the HIGDEN will (prior to the KANOIVICKI'S retaining counsel) was considered in appeal number 01A01-9209-CV-00369. A copy of that decision is attached for reference. (See Exhibit #1) That decision, which addressed only issues applicable to CAROLYN HIGDEN and the Main Street Church of Christ, sustained the decision of the trial judge in granting a motion for summary judgment in favor of the LAPIDUS cousins. As outlined in greater detail in the appellant's statement of the case, the trial court, subsequent to the granting of the summary judgment against HIGDEN and Main Street Church of Christ, has ruled that that disposition left no other contestants before the court, and

that consequently no further contested proceedings were necessary in the Circuit Court. In effect, the trial court has ruled, by granting a motion filed by the LAPIDUS cousins to dismiss the KANOIVICKI'S Circuit Court pleadings, that the disposition as to HIGDEN eliminated any further basis for contest in the in rem proceeding.

II. STATEMENT OF THE CASE:

Upon the filing of the petition for solemn form probate by the LAPIDUS cousins in the Probate (Chancery) Court of Coffee County, a summons was issued pursuant to Rule 3 of the Rules of Civil Procedure (R. 105 and 108), giving notice to the KANOIVICKI cousins of the pendency of the action. That summons was issued on December 7, 1990, and returned on February 20, 1991 (R. 105 and 108). The summons, as to each KANOIVICKI brother,

contained the standard notice that an answer would be required within 30 days, and further contained a "notice of disposition date" stating that the matter would be disposed of twelve months from the date of the filing (R. 105 and 108). Served by certified mail, the returns indicated execution by the KANOIVICKIS on January 3, 1991, and receipt by the Petitioner's counsel on January 10, 1991. Each summons was filed with the court by Petitioner's counsel on February 20, 1991 (R. 105 and 108).

The KANOIVICKIS filed a pro se answer (in Spanish) with the Probate Court on February 3, 1991 (R. 50) . The English translation appears at page 55 of the record. That answer challenges the validity of the process issued against the KANOIVICKIS and specifically contests the validity of the wills on the issue of

David King's "mental faculties." The answer requests suspension of the court proceedings until some unspecified proper compliance with the process requirements of Argentina have been satisfied (R. 55 and 56).

In support of the position by the LAPIDUS cousins that the KANOIVICKI cousins had been properly and meaningfully notified of the proceedings, the Petitioners have offered to the court a translation of a telephone discussion between a translator employed by the LAPIDUS cousins' attorneys, and an Argentinean attorney purporting to represent the KANOIVICKIS (R. 63). Throughout that translation, the representative of the Nashville law firm repeatedly emphasizes, with regard to the KANOIVICKIS, that there is "no need to be here" (R. 65 and 66). It is further

repeatedly stated to the KANOIVICKI'S Argentinean attorney that there were "no rights lost", and that they would be notified regarding future proceedings (R. 66).

Subsequent orders, which were certified to the KANOIVICKIS in English form, make reference to the "trial of the will contest" in Circuit Court being "protracted", and clearly contemplate the "presence" of the KANOIVICKIS for that trial. (See Exhibit #2).

The LAPIDUS cousins (also referred to as the King Petitioners) filed their motion for summary judgment against CAROLYN HIGDEN and the Main Street Church of Christ on October 22, 1991 (R. 185). An order was entered setting that matter for oral argument on October 9, 1992 (R. 197).

A "final order" which grants the motion for summary judgment in the Circuit Court contest proceedings was entered on October 22, 1992 (R. 377), and found that CAROLYN HIGDEN could not propound the handwritten document which she had offered in common form in the Chancery Court, primarily due to the trial court's conclusion that she was judicially estopped from taking a position in the will proceedings which were patently inconsistent with the position taken by her in other, unrelated proceedings dealing with the competency of David King.

At this point in the procedural history of the matter, it must be noted that the KANOIVICKIS had not retained local counsel, and had filed only the Spanish language pro se answer referred to above in the Chancery proceedings, and

in response to the service of the solemn form petition.

An October 16, 1992 order in the Circuit Court stated that the KANOIVICKI cousins would have until November 9, 1992 "to file pleadings or other documents related to their position as potential heirs of David King . . . ", but qualifying that statement by reserving any question as to the timeliness of those documents (R. 200).

On November 9, 1992 the KANOIVICKIS, having employed the undersigned as counsel, filed an "Answer and Statement of Contest by MAURICIO KANOIVICKI and LEON KANOIVICKI as Intestate Heirs of the Estate of David King" (R. 203). That statement, tendered for the purpose of framing the issues (as discussed in greater detail below) contains a description of the specific issues to be

tried before the jury in the Circuit Court will contest (R. 203).

The LAPIDUS cousins (King Petitioners) filed a motion for summary judgment as to the KANOIVICKIS on March 29, 1993 (R. 209). That motion sought summary judgment on "both procedural and substantive grounds", asserting that the KANOIVICKIS "did not attempt to intervene until after the entry of final judgment" (R. 209).

The KANOIVICKIS, through the undersigned counsel, filed a response to the motion for summary judgment on May 3, 1993 (R. 321). The LAPIDUS cousins/King Petitioners thereafter further filed a motion to dismiss pursuant to Rule 12.02 as a supplement to the summary judgment motion, asking that the matters considered in the evaluation of the motion to dismiss be treated as a summary

judgment application to the extent it reviewed matters outside the pleadings (R. 375).

Following discussion of the issues before Judge John W. Rollins in the Circuit Court of Coffee County at Manchester on May 27, 1993, an order was entered on June 4, 1993 granting the motions on grounds that the previous order entered in the Circuit Court proceedings on October 20, 1992 (eliminating the HIGDEN contest) constituted a final disposition of the in rem proceeding, and further finding that the court no longer had subject matter jurisdiction over the will contest (R. 412).

A timely notice of appeal and Rule 24 statement were filed by the Appellants/KANOIVICKIS on June 15, 1993 (R. 415).

III. STATEMENT OF THE ISSUES:

The general issue presented for consideration in this appeal is whether the trial court was correct in its finding that it no longer had subject matter jurisdiction to consider the will contest following disposition of the HIGDEN summary judgment issues on October 22, 1992, and that the KANOIVICKIS had not responded in a timely manner to the will contest proceedings. Several specific issues must be evaluated in examining the correctness of the court's decision. Those issues are as follows:

A. DID THE TRIAL COURT FOLLOW PROPER PROCEDURE IN GRANTING SUMMARY JUDGMENT, OR DISMISSAL, WHERE NO AFFIDAVIT OR DEPOSITION ESTABLISHES THE STANDING OF THE LAPIDUS COUSINS/KING PETITIONERS?

B. MAY SUMMARY JUDGMENT BE GRANTED IN THE SOLEMN FORM WILL CONTEST WHERE THE MANDATORY PROCEDURAL REQUIREMENTS FOR FRAMING THE ISSUES HAS NOT BEEN FOLLOWED?

C. MAY SUMMARY JUDGMENT BE PROPERLY GRANTED IN A SOLEMN FORM WILL CONTEST PROCEEDING WHERE THE TESTIMONY OF THE ATTESTING, SUBSCRIBING WITNESSES IS NOT PRESENTED EITHER IN OPEN COURT, OR BY DEPOSITION?

D. DOES THE "FINAL ORDER" ENTERED ON OCTOBER 22, 1992, REFERABLE TO THE CAROLYN HIGDEN STATEMENT OF CONTEST, OPERATE AS RES JUDICATA AS TO THE KANOIVICKIS?

E. ONCE A JURY DEMAND IS MADE BY THE LAPIDUS GROUP IN THE SOLEMN FORM PETITION, PURSUANT TO RULE 38 OF THE RULES OF CIVIL PROCEDURE, IS IT NECESSARY FOR THE ISSUE OF THE ATTESTATION OF THE SUBSCRIBING WITNESSES TO BE HEARD BY THE JURY, OR MAY THAT REQUEST BY WITHDRAWN UNILATERALLY?

F. IN THE CONTEXT OF CONSIDERATION OF A SUMMARY JUDGMENT MOTION, DO GENUINE ISSUES OF MATERIAL FACT EXIST? AND, THE RELATED ISSUE:

WHAT EFFECT DOES JUDICIAL ESTOPPEL HAVE ON THE ABILITY OF THE LAPIDUS GROUP/KING PETITIONERS IN ASSERTING A POSITION SUPPORTIVE OF DAVID KING'S COMPETENCY IN THE WILL PROCEEDINGS WHICH IS PATENTLY INCONSISTENT WITH PREVIOUS POSITIONS TAKEN BY THEM IN OTHER JUDICIAL PROCEEDINGS?

IV. ARGUMENT AND SUMMARY OF THE LAW:

Simply stated, the LAPIDUS petitioners elected to probate the disputed will in solemn form. Process was issued as required by Rule 3 of the Tennessee Rules of Civil Procedure, and service was effected against the Respondents, including the KANOIVICKI cousins. The KANOIVICKIS answered, and specifically denied the validity of the wills on the basis of David King's long-standing mental incompetency. The KANOIVICKIS specifically requested, in the answer filed in the Chancery Court (Probate) proceedings, notice of the trial date. Having served the KANOIVICKIS, pursuant to Rule 3, the LAPIDUS group has never filed any motion for judgment by default. The KANOIVICKI cousins have been awaiting notice of a trial date on the issues, and have been

served with no notice of that date. In fact, the summons indicated to them a "disposition date" one year from the date of the filing of the summons. It has now been ruled by the trial court that a disposition as to another contestant/proponent, CAROLYN HIGDEN, is dispositive as to the entire solemn form probate proceeding, and that no further proceedings will be held to determine the validity of the disputed will or wills.

Summary judgment, or dismissal pursuant to Rule 12, is inappropriate for the reasons outlined below:

A. NOWHERE IN THE PLEADINGS FILED BY THE LAPIDUS GROUP, BY AFFIDAVIT, DEPOSITION OR OTHERWISE, IS THE SPECIFIC STANDING OF THE SO-CALLED "KING PETITIONERS" DEMONSTRATED.

Before summary judgment could be considered, an affidavit establishing the rights of BETTYE JEAN GREENE; MARTIN KING; DEBORAH LAPIDUS FISHER; LISA

LAPIDUS COHEN; and BARRY LAPIDUS must be demonstrated by a proper factual presentation, and made referable to the named beneficiaries in the will proposed for probate. Otherwise stated, it may not be assumed, for purposes of the present proceeding, that those individuals (whose names have merely appeared in the pleadings) have any rights through the will as beneficiaries or heirs of MELBA LAPIDUS. The source of their interest must be described with factual specificity. The failure to outline the entitlement through which they purport to appear in the pleadings raises an issue of fact that must be considered by the court:

> "The Co-Administrator DEFENDANT'S AFFIDAVITS DO NOT RESOLVE THE ISSUE OF WHETHER THE PLAINTIFFS ACQUIRED ANY INTEREST BY INTESTATE SUCCESSION FROM A. J. TUCKER, nor do they resolve the issue of whether the property described in the complaint

> was the property of Nell Tucker. The affidavits do say the handwriting and signature in the holographic will appear to be that of Nell Tucker. It is not apparent from the record whether a court has determined the holographic will of Nell Tucker was her Last Will and Testament. In effect, we are asked to make that determination in the absence of an explanation in the sparse record." Goss, et al v. Priest, et al, Court of Appeals, Eastern Section, filed February 27, 1990, copy attached (emphasis added).

The purpose of summary judgment is to provide an economical method of concluding cases on issues as to which there is no dispute regarding any material fact. Rainey v. Stansell, 836 S.W.2d 117 (Tenn. App. 1992); Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993). The moving party in a summary judgment must that there are no genuine, material facts which would require a trial.

> "Second, to preclude summary judgment, a disputed fact must be 'material'. A disputed fact is material if it must be decided in order to resolve

the substantive claim or defense at which the motion is directed. Therefore, when confronted with a disputed fact, the court must examine the elements of the claim or defense at issue in the motion to determine whether the resolution of that fact will effect the disposition of any of those claims or defenses . . . . Fourth, the parties seeking summary judgment has the burden of demonstrating to the court that there are no disputed, material facts creating a genuine issue for trial, as we have defined those terms, and that he is entitled to judgment as a matter of law." Byrd v. Hall, 847 S.W.2d 208, at page 215 (Tenn. 1993).

The attached decision from the Eastern Section, Court of Appeals, Goss, et al v. Priest, et al, supports the contention of the Appellants/KANOIVICKIS that each of the purportedly named LAPIDUS cousins must demonstrate, in support of their summary judgment motion, that they have standing (as an interested person) through one of the beneficiaries named in the will. That factual assertion is entirely absent from the affidavits and depositions tendered by

the LAPIDUS cousins in support of their motion for summary judgment. Simply stated, their names appear in the caption, and an allegation appears in the petition for probate. Standing to pursue the action, a material fact under the foregoing authority is not addressed.

B. **MAY SUMMARY JUDGMENT BE GRANTED IN THE SOLEMN FORM WILL CONTEST WHERE THE MANDATORY PROCEDURAL REQUIREMENTS FOR FRAMING THE ISSUES HAS NOT BEEN FOLLOWED?**

Summary judgment is always procedurally improper in a will contest prior to the issues being formally framed by the trial court, as required by Tennessee Code Annotated, §32-4-104. Reynolds v. Day , 792 S.W.2d 924 (Tenn. App. 1990); Carty v. Patton, Court of Appeals, Eastern Section, May 17, 1985, copy attached. That requirement, of "making up the issue" is discussed in

Pritchard on Wills nd Estates, Fourth Edition, §366 at page 470:

> "No particular form of issue is required; all that is necessary is to show that the will is propounded and averred to be the last will of the decedent, on the one hand, and that the affirmation is denied on the other. If the contestant chooses, for the purpose of saving costs or for any other reason, to limit the contest to any particular clause, thus admitting and putting out of dispute the balance of the will, he may have the right to do so. But a general denial of the plaintiff's affirmation that the paper is the will of the decedent brings the will as a whole, and every part of it, into contest. If, therefore, the contestant files a general denial, and also pleads specially, the court properly may strike out the special pleas." Pritchard, §366, at page 470.

> "On the remaining issue, a summary judgment may be proper in a will contest proceeding, provided there are no disputed issues of material fact. Union Planters National Bank of Memphis v. Inman, 588 S.W.2d 757 (Tenn. App. 1979). IN THE INSTANT CASE, THE PROCEEDING IN CIRCUIT COURT WAS IRREGULAR IN THAT THE SUMMARY JUDGMENT WAS GRANTED PRIOR TO THE ISSUES BEING FRAMED BY THE TRIAL COURT, AS REQUIRED BY T.C.A. §32-4-101. (Emphasis added).

The issue or issues are made up under the direction of the court and may be by complaint and answer filed in the usual way, or by entry on the minutes of the court. The authors of Pritchard on Wills and Administration of Estates (4th Ed. 1983), suggests that the better procedure is by minute entry 'as the minutes are under the immediate supervision of the court, and it is probable the statute intended the issues to be so made up." §366, page 470. Carty v. Patton, (copy attached), at page 3.

C. **MAY SUMMARY JUDGMENT BE PROPERLY GRANTED IN A SOLEMN FORM WILL CONTEST WHERE THE TESTIMONY OF THE ATTESTING, SUBSCRIBING WITNESSES IS NOT PRESENTED EITHER IN OPEN COURT, OR BY DEPOSITION?**

Tennessee Code Annotated, §32-2-104 provides as follows:

"PROOF OF WILL GENERALLY. - (a) Written wills with witnesses thereto, when not contested, shall be proved by at least one of the subscribing witnesses, if living. Every Last Will and Testament, written or nuncupative, when contested, shall be proved by all of the living witnesses, if to be found, and by such other persons as may be produced to support it.

> (b) Upon petition of any interested party, the court, in its discretion, may permit the proof of any subscribing witness who is outside of the state or county or who is unable to testify in person to be taken by interrogatories or depositions a photostatic copy of the original will may be furnished to the witness, or in the discretion of the court, the original will may be withdrawn and used in the same manner prescribed by §32-2-103."

In the context of a summary judgment application, it has been held that the foregoing requirements cannot be waived, and that the filing of an affidavit by the attesting witness is not sufficient in the presentation of a motion for summary judgment. The requirement is not waivable in a solemn form proceeding, and may not be avoided by the summary judgment procedure:

> "The statute is silent on the subject of proof by wills in the probate court in solemn form, but by implication, conformably to the practice in the ecclesiastical courts, requires that all of the subscribing witnesses to be found

should give testimony to establish a written will with witnesses in solemn form, even when no opposition is interposed . . . .UNLESS AND UNTIL THERE IS A REPORTED DECISION TO THE CONTRARY, IT APPEARS THAT ALL WITNESSES WHO ARE AVAILABLE MUST BE EXAMINED IN PERSON EVEN THOUGH THEY HAVE EXECUTED AFFIDAVITS PURSUANT TO T.C.A. §32-211." Pritchard, §332, at page 434. (emphasis added)

In a will contest which was resolved by summary judgment, that mandatory requirement was discussed, and lessened to some extent, by the allowance of a deposition, but only after the opportunity to cross-examine:

"It is unnecessary, in every instance, for the proponent to offer the live testimony of the available attesting witnesses. This court has held that Tennessee Code Annotated, §32-2-104 (a) is satisfied if the testimony of the attesting witnesses is preserved by deposition, after the contestants have been given the opportunity to cross-examine. Swindoll v. Jones, 41 Tenn. App. 89, at page 109 and 110, 292 S.W.2d 531, at page 541 (1954). Tennessee Code Annotated, §32-2-104(b) authorizes the trial court, in its discretion, to accept and use an attesting witnesses deposition in lieu of live

> testimony, if it determines that the witness is 'unable to testify in person.' Witness unavailability is for the trial court to decide and its determination will not be set aside when the contestants have acquiesced in the proof concerning the manner in which the will was executed (citing Lyman v. American National Bank & Trust, 346 S.W.2d 289, at page 291 (1960). Owen v. Stanley, 739 S.W.2d 782 (Tenn. App. 1987)).

Accordingly, Owen and the above authorities stand for the clearly stated proposition that summary judgment may be appropriate in a will contest proceeding, but only if the requirement for testimony of the witnesses has been satisfied by use of depositions, with the opportunity for the contestants to crossexamine. In the present matter, the file reflects that the summary judgment movants have made no effort to comply with the foregoing unwaivable duty. In the present matter, as in the Owen case,

summary judgment is inappropriate and cannot stand.

D. DOES THE "FINAL ORDER" ENTERED ON OCTOBER 22, 1992, REFERABLE TO THE CAROLYN HIGDEN STATEMENT OF CONTEST OPERATE AS RES JUDICATA AS TO THE KANOIVICKIS?

This issue is the most significant point in the Appellant's claim. Simply stated, the Appellants/KANOIVICKIS were invited, by summons, to participate in the solemn form will contest proceedings. The KANOIVICKIS answered and requested an opportunity to be heard on the issue of David King's competency. As parties, and as interested persons, they have been forwarded copies of all of the Circuit Court will contest proceedings. The court order contemplated their presence. (See Exhibit #2). They have been awaiting a trial date. Now, at this stage of the proceedings, the KANOIVICKIS are being told that no further contest

may be heard, based upon the finding that CAROLYN HIGDEN, one of the contestants, may not challenge the wills due to her being judicially estopped from taking a position inconsistent with the argument she asserted in prior litigation.

The trial court's finding that it lacks subject matter jurisdiction, after disposition of the CAROLYN HIGDEN dispute, is patently incorrect, for several reasons, which are outlined below. The Appellees asserted, in support of their motion for summary judgment, that the KANOIVICKIS were excluded from the matter after October 22, 1992, having failed to retain an attorney and file the requisite cost bond in the probate court until after that date. No case law or statute supporting that conclusion appears anywhere in the memorandum filed by the Appellees at the

trial level in support of their motion for summary judgment. No authority submitted by the Appellees supports the conclusion that the filing of the cost bond, in the probate court, is jurisdictional as to each purported contestant. On the contrary, the overwhelming volume of authority on that point, reaches the opposite conclusion. The purpose of the bond in a probate context is merely to secure and guarantee the payment of costs. Whether one contestant files a cost bond, or all contestants chose to file a cost bond, is not important.

It is correct that T.C.A. §32-4-101 mandates a "contestant" filing a bond for the purpose of securing the costs of the will contest. That act is necessary for the transfer, or certification, of the

probate proceeding to the circuit court for the will contest.

However, even if the KANOIVICKIS had not been served with process, and answered in a timely manner, their participation in the circuit court proceedings, as "interested persons" requires that the trial court grant to the KANOIVICKIS the opportunity to be heard on the issue of the validity of all of the wills in question. That conclusion is supported by the authorities outlined below. The point is succinctly stated in the following excerpt from the case of In Re: Estate of King, 760 S.W.2d 208 (Tenn. 1988) where the court directly addressed the issue of the technicalities required for an individual who desires to participate in the contesting of the validity of a will:

> "Counsel also argued in the trial court that the law provides for the manner in which one announces or informs or advises of a contest. His complaint is that the Administratrix of Mr. King's estate did not file an answer to the application for probate and gave no notice that a contest would be precipitated. His reference to the statute is an imprecise statement of the law. There is no formal announcement required to establish oneself as a contestant to the validity of any last will or testament. Notice may be given but it is not required. A person desiring to contest a will need do no more than make that fact known. When his interest is made known and his right to contest has been established, under the provisions of T.C.A §32-4-101 the court having probate jurisdiction must certify the fact of the contest to the circuit court which has original and exclusive jurisdiction on the issue of devisavit vel non." 760 S.W.2d 208 at page 211.

The significance of the KANOIVICKIS' participation in the Circuit Court proceedings as interested parties (again, even if no summons and answer were involved) is established in the following discussion from the Pritchard's treatise

on will contests, wherein it is stated that any interested party, whether a party to the record or not, can appeal a decision in a will contest:

> "But the general rule that only parties to the record can appeal does not apply in contested will cases, for the reason that the rights of persons interested in the estate, as heirs or distributees, devisees, or legatees, are settled conclusively by the results of the trial, whether they are named as parties or not. Consequently, all such persons as might have made the contest in the first instance are entitled to intervene, if not already parties, and appeal the case." §379, Pritchard on Wills and Administration of Estates, 4th Ed., at page 480.

The central point argued by the Appellees in their summary judgment application is that the KANOIVICKIS failed to do something, in the Circuit Court, which would permit them to be treated as contestants. What specific authority exists which suggests that,

after being served with ia summons, and having filed an answer contesting David King's mental condition, the KANOIVICKIS are somehow required to file additional pleadings in either the Probate or Circuit Court? The answer to that assertion is precisely stated in §346 of the Pritchard's Treatise, at page 453 (Mode of Being Admitted as Contestant):

> "There is no formality in being admitted as a contestant in the case. The person intending to contest the will is not required to give notice of his intention, but he may do so if he chooses."

Further, the viability of the answer filed by the KANOIVICKIS in the Probate Court is supported by the authority which recognizes that pleadings filed in the Probate Court may be amended in the Circuit Court will contest, without the remand of the case to the Probate Court for that purpose. Pritchard's, §366 at

page 471; Needham v. Doyle, 286 S.W.2d 601 (Tenn. App. 1955).

Further, as an in rem proceeding, a will contest may not be unilaterally concluded by any party, a proponent or contestant:

> "After the proceedings have been certified to the Circuit Court for trial, contestants will not be permitted to withdraw or abandon the contest over the objection of proponents nor is the proceeding abated by the death of each the contestant or the proponent." §368 Pritchard on Wills and the Administration of Estates, at page 472. Arnold v. Marcom, 352 S.W.2d 936 (1961).

Another fundamental reason for asserting that the KANOIVICKIS are not bound by the summary judgment results as to contestant/proponent CAROLYN HIGDEN is based upon a review of the wording the court's purported "final order." Simply stated, that order does not probate any will of the decedent David King (R. 377).

Instead the order contains a finding that "there are no longer any contestants before the court to the wills propounded by the King Petitioners, and the proceedings in the Circuit Court are therefore concluded." The failure of that court order to affirmatively probate any of the three wills precludes any finality to the will contest proceeding. That is because, in a solemn form proceeding, no re-probate takes place in the Probate Court. The final order of probate, approving the instrument which will be the Last Will and Testament of David King, takes place only in Circuit Court:

> "The decision of the issue devisavit vel non against the validity of the will annuls and revokes the former probate; the effect of a verdict and judgment in favor of the will is to revive in full force the former probate, which was suspended during the contest. If the contest was begun before probate in common form in the Probate Court, the decision of the issue in the Circuit Court is

> of itself a probate of the will, in solemn form, or else an adjudication that the paper is no will and cannot be admitted to probate. In any event, therefore, no reprobate takes place in the Probate Court: The only duty that court has to perform is to record the certificate of the verdict and judgment, and the original will, if established. In a case where the will has been probated in common form, the contestant withdraws his opposition in Circuit Court, and the case is remanded to Probate Court to be 'proceeded in as in the case of uncontested wills'. No order of the Probate Court reinstating the probate is necessary; the effect of the order of the Circuit Court is to revive the probate.' But if the will has not been probated in the Probate Court, and the contest is abandoned in the Circuit Court, the case will be remanded to the Probate Court with directions to proceed with the probate in common form."

In the present matter, the purported final order is not a final order at all, except as to the narrow issue involving CAROLYN HIGDEN and the Main Street Church of Christ. Consistent with the decision of this court in the appellate review of that case (appeal number 01A01-9209-CV-

00369) the court notes on page 23 of the decision that the validity of the will of April 8, 1985 has not been adjudicated, and that, as to Main Street Church of Christ and CAROLYN HIGDEN, the effect of the present judgment is to uphold the January 18, 1985 Will and to reject CAROLYN HIGDEN'S holographic instrument.

Nothing decided in the trial or appellate level decision involving Main Street Church of Christ or CAROLYN HIGDEN can be considered as determinative of the rights of the KANOIVICKI cousins since collateral estoppel nor res judicata will apply where there is a lack of identity of parties or their privies and identity of issue on the factual points involved.

> "The defendant also contends that the present action is barred by the application of collateral estoppel. The Tennessee Supreme Court in King v. Brooks stated that 'under the doctrine of collateral estoppel, when an issue has been actually and

> necessarily determined in a former action between the parties, that determination is conclusive upon them in subsequent litigation . . . . In order to bar the re-litigation of certain facts determined in the former action by applying the doctrine of collateral estoppel, there must be an identity of the parties or their privies, and an identity of the issue.'" (Citing Blue Diamond Cole v. Holland America Insurance Co., 671 S.W.2d 829, 832 (Tenn. 1984);) Stack v. Saunders, 812 S.W.2d 586, at page 591 (Tenn. App. 1990).

Appellant summarizes the foregoing issue as follows: Having been served with process and having answered in the Probate Court, and the proceeding, as an in rem action being certified to Circuit Court for a will contest, upon the bond of another contestant, the KANOIVICKIS were before the court as parties. (2) Even if the KANOIVICKIS were, for some reason, not considered parties, they were certainly before the court as "interested persons" who had a right to participate

in the contested proceedings. (3) The KANOIVICKIS have never had the opportunity to come to court and present proof on the issue of David King's competency at a trial of the issues. (4) There is no res judicata or collateral estoppel effect which is binding upon the KANOIVICKIS, and a result of the purported final order of October 22, 1992. Entirely independent of the foregoing considerations, it must be remembered that T.C.A. §32-4-108 establishes a two year statute of limitations in solemn form proceedings and to a contest of a will admitted in solemn form. Even if Appellant is incorrect on the previous matters discussed, the record demonstrates that the KANOIVICKIS filed their own cost bond in the Chancery (Probate) Court on November 9, 1992 (R. 207) well within the

two year period which elapsed from the date of the initial filing of the solemn form action on December 7, 1990 (R. 105 and 108).

E. ONCE A JURY DEMAND IS MADE BY THE LAPIDUS GROUP IN THE SOLEMN FORM PETITION, PURSUANT TO RULE 38 OF THE RULES OF CIVIL PROCEDURE, IS IT NECESSARY FOR THE ISSUE OF THE ATTESTATION OF THE SUBSCRIBING WITNESSES TO BE HEARD BY THE JURY, OR MAY THAT REQUEST BE WITHDRAWN UNILATERALLY?

Rule 38 of the Tennessee Rules of Civil Procedure provides that, after any party has made a request for a jury demand, that demand may not be withdrawn "without the consent of all parties as to whom issues have been joined." Rule 38 therefore mandates that the issue of statutory proof, required by Tennessee Code Annotated, §32-2-104 be submitted to a jury, rendering any type of summary judgment presentation procedurally improper. That conclusion is based upon

the authority summarized below, as well as the above-noted points covered in the issue which addresses the requirement for live or deposition testimony of the attesting witnesses. (Also, see Pritchard, §367 at page 471 indicating applicability of the Tennessee Rules of Civil Procedure to will contests, specifically in the context of jury issues). The disposition as to CAROLYN HIGDEN and Main Street Church of Christ in no way modifies that requirement, after the KANOIVICKIS have appeared and made known their objections to the will:

> "But a general denial of the plaintiff's affirmation that the paper is the will of the decedent brings the will as a whole, and every part of it, into contest." Pritchard, §366 at page 470.

That is particularly true where other wills of the decedent may be at issue:

> ". . . Being a proceeding in rem, it is proper to permit the propounding of other wills than the one first offered for probate, and against which a contest was instituted, so that the jury may determine which of the papers if the true will of the decedent." Pritchard, §341, at page 447.

The "petition for probate in solemn form" filed by the LAPIDUS cousins December 7, 1990 (attached as Exhibit #5 for ease of reference) alleges the fact (and raises the issue of) the attestation of the witnesses of the wills proposed. It raises the factual issue of the validity of the two formal wills (April 8, 1985 and January 18, 1985), and further attaches as an exhibit, and brings into issue, the "undated handwritten document" proposed by CAROLYN HIGDEN.

The present version of T.C.A. §32-4-107 states that the contested issue "may" be tried by a jury, but the effective

date of that modification of the statute is May 13, 1992. Prior to May 13, 1992, T.C.A. §32-4-107 the statute read as follows:

> "Trial by Jury - certification to Probate Court. - (a) The issue shall be tried by a jury, and their verdict, and the judgment of the court upon the validity of the will shall be certified to the court having probate jurisdiction over such will to be recorded together with the original will if established."

The statute does not specify its application, in removing the mandatory requirement for a jury trial, to matters pending prior to the statute's change. Since the determination directly affects the substantive rights of the Appellants, and is not merely procedural in nature, Appellants assert that the mandatory requirement remains for the resolution of the King will contest. Aside from that change in the statute, the LAPIDUS

cousins have effectively circumvented the requirements of Rule 38, as to the KANOIVICKI cousins, by their assertion that the summary judgment disposition in the HIGDEN matter concludes the case.

F. IN THE CONTEXT OF CONSIDERATION OF A SUMMARY JUDGMENT MOTION, DO GENUINE ISSUES OF MATERIAL FACT EXIST?

It is factually undisputed that the decedent, David King, suffered from Alzheimer's disease and dementia during the general time frame (January and April, 1985) in which the formal wills were executed. The King Petitioners/LAPIDUS cousins, in the Federal Court proceedings, and in the conservatorship filed in 1985, vigorously asserted the position, in behalf of the LAPIDUS family, that Mr. King was "totally incapable of making any important decisions", and that he had

been in that condition for "at least a year" prior to the commencement of the conservatorship proceedings (R. 338, 343, 344, 345, 346, 347, and 348). Curiously, the LAPIDUS cousins and the HIGDENS have found themselves in a reversal of roles on the competency issue at this stage of the proceedings.

Aside from the obvious estoppel difficulties which the LAPIDUS cousins would encounter at the trial of the matter, those words have significance in evaluating the question of whether issues of material fact exist in the present argument. When Melba King Lapidus filed her "Verified Petition for Appointment of a Conservator" on April 16, 1985, she alleged, under oath, the following matters regarding David King, all of which are excerpted from the attachments

which are referenced in the record, as above-noted:

A. That he was, at the time, "in an incompetent state of mind due to his advanced age."

B. That he was, at that time, "totally incapable of making any important decisions . . . . "

C. That he was, at that time, "severely confused and disoriented from a chronic brain syndrome and requires an attendant around the clock."

D. That he was, at that time, "completely disoriented and confused . . . . " Record page 338, 343, 344, 345, 346, 347, and 348.

Significantly, (in the context of evaluating the decedent's ability to remember what his assets were and the identity and nature of his purported beneficiaries) reports filed by the conservators six months later in support of their pending issues, indicated the following:

A. "His recent memory was grossly impaired."

B. On November 18, 1985, Mr. King thought the date was December 25, 1988, and that his birthdate was 1973.

C. "He could not retain two sentences over five minutes."

D. He was "functioning at approximately the same level as six months ago." Record page 338, 343, 344, 345, 346, 347, and 348.

Judicial estoppel precludes the LAPIDUS cousins from taking a position in the will contest which would dispute the foregoing allegations in earlier litigation. Gilley v. Jernigan, 597 S.W.2d 313 (Tenn. App. 1979).

> "This court has succinctly described the contestant's burden of proof as follows: Where, however, the contestant shows the existence of a suspicious circumstance such as a confidential relationship in combination with the beneficiary's involvement in procuring the will, or in combination with impairment or the testator's mental capacity, there arises a presumption of fraud or undue influence with the proponent of the will must overcome with a preponderance of the

evidence." Owen v. Stanley, 739 S.W.2d 782 (Tenn. App. 1987).

It is conceded by the Appellants/KANOIVICKI cousins that the mere appointment of a conservator does not alone remove testamentary capacity. However, §369 of Pritchard, at page 473, notes that "in cases of doubtful capacity. . . the burden is upon the proponent to satisfy the minds of the jury that the testator was not imposed upon and that he had knowledge of the contents of the instrument, and that it was executed freely and understandingly, with testamentary intent." The issue is one of fact, to be determined by the trier of fact. While the pendency of the conservatorship does not per se remove testamentary capacity, it may be considered as evidence of incapacity, along with other evidence. Harper v.

Watkins, 670 S.W.2d 611 (Tenn. App. 1983).

Where mental debilitation is shown to have existed at some point prior to the execution of the proposed will, "the presumption of the law that it continues, unless the malady or delusion under which the testator labored was, in its nature, accidental or temporary, and the burden of showing capacity at the time of the execution of the will is shifted upon the party insisting upon its validity. Where the evidence leaves it doubtful whether or not sufficient capacity existed, the burden of removing the doubt is upon the proponents." Pritchard, §104, at page 151. Bruster v. Ethridge, 345 S.W.2d 692, at page 699 (1960); Bank of Commerce & Trust Co. v. Stavros, 103 S.W.2d 593 (1936); Harper v. Watkins, 670 S.W.2d 611

(Tenn. App. 1983); In Re: Estate of Elam, 738 S.W.2d 169 (Tenn. 1987).

Attached to the response of the KANOIVICKI cousins to the LAPIDUS' motion for summary judgment is the affidavit of Dr. Ravi Singh, M.D., M.P.H., a psychiatrist specializing in geriatric services (R. 350).

As an expert in the treatment and evaluation of organic brain diseases (including Alzheimer's in the elderly) Dr. Singh has reviewed all of the medical records of David King, including depositions taken in prior litigation in which the decedent's competency was at issue. Dr. Singh's opinion is that David King unquestionably lacked testamentary capacity for the period after April, 1984, and until his death, and probably for at least many months prior to 1984. Dr. Singh expresses the opinion that, due

to the advancing organic brain disease, it was not possible for Mr. King, after April, 1984, to understand the nature of his purported testamentary act, due to grossly dysfunctional memory; disorientation as to time, place and person; delusional thoughts; irrational reasoning processes; and general mental confusion and dementia.

Further, where circumstances such as age and mental infirmity are shown, the presumption arises that the decedent is unduly influenced in any dealings where a beneficiary assists in the procuring of a will.

> ". . . It is for the jury to judge whether or not any influence was exercised on the occasion of making the will; if so, whether it was by fair and reasonable means, or by unfair or fraudulent means, and whether or not it was sufficient to void the will and decide accordingly." Pritchard, §150, at page 202; Taliferro v. Green, 622 S.W.2d 829 (Tenn. App. 1981).

Only in cases where the contestants come forward with no proof on either the undue influence or the lack of testamentary capacity issues would it be appropriate for the court to grant summary judgment. Where the proof before the court, by affidavit and deposition, is undisputed that Mr. King was aged and mentally infirm (and, as the LAPIDUS cousins stated in previous litigation, "totally incapable of making any important decisions") the matter should be submitted to the jury for full consideration of the mental capacity issue, as it relates to all three offered wills. The purpose of summary judgment is to provide an economical method of concluding cases on issues as to which there is no dispute regarding any material fact. Rainey v. Stansell, 836 S.W.2d 117, 119 (Tenn. App. 1992). In

deciding a motion for summary judgment the court must view the pleadings and the evidence before it in the light most favorable to the opponent to the motion. Wyatt v. Winnebago Industries, Inc., 566 S.W.2d 276, 279 (Tenn. App. 1977). If it is shown that no genuine issue as to any material fact exists, the moving party is entitled to a judgment as a matter of law. Daniels v. White Consolidated Industries, Inc., 692 S.W.2d 422, 424 (Tenn. App. 1985). Appellant asserts that there can be no serious dispute of the idea that the matters summarized above, taken from Dr. Singh's affidavit, and the previous pleadings filed by the LAPIDUS family, would constitute "material" facts that would create a genuine issue at the trial of the case, within the meaning of the requirements

outlined in Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993).

V. SUMMARY:The foregoing discussion of the issues presented may be summarized as follows:

1.The KANOIVICKI cousins were served with process and filed an answer stating that they intended to contest the David King wills on the issue of capacity. They were informed by the court summons and subsequent process that they would be advised of a trial date. Although no procedural requirement demanded any further intervention or appearance by the KANOIVICKIS, they have been deprived of an opportunity to test the competency issue, as an issue of fact, by the trial court's granting of the summary judgment/motion to dismiss.

2. Certain procedural prerequisites, which cannot be waived

pertaining the framing of the issues in a will contest, and the presentation of live or deposition testimony by the attesting witnesses, have clearly not been met, and the matter must be remanded for satisfaction of those requirements.

3. As an in rem proceeding, the Circuit Court contest may involve the participation of any interested person, with no particular procedural requirements being necessary as a predicate to that participation.

4. Even if the KANOIVICKIS had failed in some aspect of a procedural requirement prior to the granting of the summary judgment against CAROLYN HIGDEN the matter is not foreclosed as to the KANOIVICKIS. That is because the statute of limitations involved in challenging a will probated in solemn form is two years from the date of the filing of the Wills,

and the KANOIVICKIS filed additional pleadings in the Circuit Court and Probate Court prior to the expiration of two years, and before the purported "final order" became final.

5. Issues of material fact exist regarding David King's competency, as shown by the affidavit of the attesting psychiatrist, who opposed the summary judgment motion, as well as the pleadings filed in prior litigation by the LAPIDUS cousins suggesting the incompetency of David King.

Based upon the foregoing assertions, it is the Appellants request that the decision of the trial judge be reversed, and that the matter be remanded to the Circuit Court of Coffee County for a jury trial on the issue of devisavit vel non.

Respectfully submitted,

WM. KENNERLY BURGER, P.C.

s/Ken Burger

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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing has this date been mailed to the following: J. Stanley Rogers, Attorney at Law, ROGERS, RICHARDSON & DUNCAN, 100 N. Spring Street, Manchester, TN 37355; James H. Henry, II, Attorney at Law, HENRY & McCORD, P. 0. Box 538, Tullahoma, TN 37388; Robert L. Huskey, Attorney at Law, P. 0. Box 777,

Manchester, TN 37355; Michael I. Mossman, Attorney at Law, EISENSTEIN, MOSES AND MOSSMAN, One Church Street, Suite 500, Nashville, TN 37201-1607; William K. Harbison, Attorney at Law, SHERRARD & ROE, 424 Church Street, Suite 2000, Nashville, TN 37219; H. Thomas Parsons, H. Thomas Parsons, Attorney at Law, 101 W. Main Street, Manchester, TN 37355; George E. Barrett, Attorney at Law, BARRETT, JOHNSTON & PARSLEY, 217 Second Avenue North, Nashville, TN 37201; this 7th day of October, 1993.

s/Ken Burger

EXHIBIT SUMMARY

Exhibit 1 - Court of Appeals decision

Exhibit 2 - Order

Exhibit 3 - Goss, et al v. Priest, et al, Court of Appeals, Eastern Section, filed February 27, 1990

Exhibit 4 - Carty v. Patton, Court of Appeals, Eastern Section, May 17, 1985

Exhibit 5 - Petition for Probate in Solemn Form

IN THE SUPREME COURT FOR THE
STATE OF TENNESSEE

NO. 01A01-9309-CV-00396

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,

Plaintiffs-Proponents,

VS.

CAROLYN HIGDON, LEON KANOIVICKI,
and MAURICIO KANOIVICKI,

Defendants-Contestants,

AND

CAROLYN HIGDON,

Plaintiff-Proponent,

VS.

BETTYE JEAN GREEN, MARTIN KING,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN, BARRY LAPIDUS,
LEON KANOIVICKI, and MAURICIO KANOIVICKI,

Defendants-Contestants.

APPLICATION FOR PERMISSION TO APPEAL

FILED IN BEHALF OF DEFENDANT/CONTESTANTS

LEON KANOIVICKI AND MAURICIO KANOIVICKI

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VS.

BETTYE JEAN GREEN, MARTIN KIND,
DEBORAH LAPIDUS FISHER,
LISA LAPIDUS COHEN and BARRY LAPIDUS,
LEON KANOIVICKI, and MAURICIO KANOIVICKI,

Defendants-Contestants.

APPLICATION FOR PERMISSION TO APPEAL

FILED IN BEHALF OF DEFENDANT/CONTESTANTS

LEON KANOIVICKI AND MAURICIO KANOIVICKI

1. LEON KANOIVICKI and MAURICIO KANOIVICKI, through the undersigned counsel, seek review by the Supreme Court of the decision of the Court of Appeals entered in the above-numbered appeal on July 27, 1994, copy attached. No petition to rehear was filed.

2. Brief statement of the case: The decision of the Court of Appeals sustains the finding of the trial judge in granting a motion for summary judgment filed in behalf of certain will proponents (referred to in the pleadings as the "King Petitioners" or "Lapidus Group") in the estate of David King, and against the KANOIVICKIS, who are intestate heirs of David King.

The procedural development of the case is extremely unusual, and involves a sequence of events which constitute such

unfairness and notice inadequacy as to constitute a due process violation.

Simply stated, as will be outlined in the matters summarized below, and demonstrated by the attached documents, a motion for summary judgment was filed in the Circuit Court will contest, in which the KANOIVICKIS have been recognized by court order as "participants", which asked for absolutely no relief as to the KANOIVICKIS (expressly or impliedly). An order was entered granting that summary judgment request as to Defendant CAROLYN HIGDON (who is no way related to the KANOIVICKIS). The order entered by the trial judge, which granted the summary judgment request, specifically stated that it was applicable only as to CAROLYN HIGDON. A subsequent appeal taken by CAROLYN HIGDON (which in no way involved the participation of the KANOIVICKIS)

resulted in the entry of an order which contained wording that stated that the disposition as to CAROLYN HIGDON in the will contest, as an in rem action, would be treated as dispositive of all issues in the will contest, and that, accordingly, the will contest was concluded. Otherwise stated, as shown by the attached pleadings, a motion which sought no relief regarding the KANOIVICKIS, and an order entered on that motion which specifically limited its application to one participant in the proceedings, was treated by the author of the Court of Appeals' decision as a final disposition of the in rem will contest. The KANOIVICKIS were not represented by counsel until shortly before a motion for summary judgment was filed against them (the KANOIVICKIS), and after the HIGDON

appeal had proceeded to the Court of Appeals.

Nevertheless, despite any notice to the KANOIVICKIS as to the possible application of the HIGDON appeal, the attached decision by the Court of Appeals, in affirming dismissal as to the KANOIVICKIS, finds that they are bound, in the in rem proceeding, by the prior order which, on its face, is expressly limited to CAROLYN HIGDON.

3. Questions presented for review: Where relief is sought only as to one will contest participant, and the order entered on that motion for summary judgment limits its application as to that one participant, does the Appellate Court's broadening of the scope of the relief to other participants constitute a violation of the KANOIVICKIS rights to

due process, and an opportunity to be heard?

4. Facts relevant to the questions presented: Attached, as Exhibit 2 to this application, is the "Motion of the King Petitioners for Summary Judgment Against Carolyn Higdon" filed by the King Petitioners on August 8, 1991. That motion, on its face, seeks only "entry of summary judgment in their favor against Carolyn Higdon, and against the validity of the undated handwritten document propounded by her." Appearing in the record, in support of the motion, is a memorandum of authorities filed by the King Petitioners, an excerpt ("summary of argument") of which is attached as Exhibit 3 to this application.

The order granting the King Petitioners' motion for summary judgment against CAROLYN HIGDON is attached as

Exhibit 4 to this application. The trial court entered findings of fact and conclusions of law on December 19, 1991, and, based thereon, filed an order on January 7, 1992 which concludes that "pursuant to T.R.C.P. 54.02 that there is no just reason for delay, and that final judgment should be entered as to Carolyn Higdon." The order further states that: "The King Petitioners' motion for summary judgment against Carolyn Higdon is granted, and her claims are hereby dismissed with prejudice."

Subsequently, an interim, procedural order entered by the Court of Appeals, Middle Section at Nashville, on September 30, 1992 expressly recognized that the matter presented for appeal involved only matters limited to CAROLYN HIGDON, and no other participants in the will contest (see attached Exhibit #5):

> "It further appears that the present appeal involves only a judgment entered on January 7, 1992, granting summary judgment against Carolyn Higdon, and ordering entry of partial final judgment pursuant to T. R. C. P. Rule 54.02."

Indeed, a previous procedural ruling by the trial judge, entered on May 27, 1992, and addressing the status of the appeal, contains the following, clearly enunciated declaration:

> "The court's decision has no effect on the remaining parties to this action." (Exhibit 6, attached).

Please note that the KANOIVICKIS and the MAIN STREET CHURCH OF CHRIST were the only remaining "parties" to the action at that time. It should be added, parenthetically, that the KANOIVICKIS had filed a detailed, Spanish language, answer in the Chancery Court Probate proceedings, outlining the details of Mr. King's long-standing Alzheimer's

condition, and their specific challenge to his testamentary capacity. The KANOIVICKIS did not employ counsel, and did not comply with the specific, technical requirements of filing a bond and formal pleadings in the Circuit Court will contest until they retained counsel, after the ruling had been entered against CAROLYN HIGDON. However, the KANOIVICKIS had been recognized as participants in the will contest proceedings by certification of copies of all of the Circuit Court will contest documents to them. Indeed, various orders and other pleadings entered in the trial court, contained express acknowledgement by the litigants, and by the trial judge, that the KANOIVICKIS were properly before the court as "participants" in the "will contest" (see attached Exhibit 7):

> "The trial of the will contest in the Circuit Court is likely to be expensive and protracted. Many of the participants reside outside of the State of Tennessee. Indeed, two potential beneficiaries, Leon and Mauricio Kanoivicki, appear to be citizens of Argentina, making communications with them and their appearance at these proceedings burdensome and expensive." (order entered by Judge Rollins March 27, 1991, Exhibit 7).

An almost identical acknowledgement by the trial judge appears in an earlier order entered on March 14, 1991. Those orders, as with all other pleadings, were sent to the KANOIVICKIS and their Argentinean counsel.

The opinion of the Court of Appeals, entered in the CAROLYN HIGDON ruling is attached as Exhibit 8 to this application. Simply stated, the KANOIVICKIS respectfully insist that the author of that opinion simply overlooked, in his review of the record, that other

participants remained involved in the trial court proceedings, and entered a broadly drafted finding, based upon correctly described rules pertaining to the in rem application of a will contest, and found that the case was over. It is that finding which provides the basis for the same court's ruling that the attached orders as to CAROLYN HIGDON, are dispositive as to the KANOIVICKIS. The KANOIVICKIS respectfully insist that that is patently incorrect and terribly unfair, since there were given no opportunity to argue these matters at the trial level, and had no reason to respond to a motion which limited its request for relief to a finding against CAROLYN HIGDON, which was expressly done by the trial judge. Now, it is stated that the KANOIVICKIS should have, for some reason, responded to the testamentary issues in

the motion for summary judgment filed against CAROLYN HIGDON, or that, later (after they retained counsel) that they should have intervened in the appeal process in the HIGDON appeal. When the trial judge's order expressly limits his ruling to CAROLYN HIGDON (in effect dismissing her from the action) why should the KANOIVICKIS do anything but encourage that result by the Court of Appeals? How may it be seriously suggested that the KANOIVICKIS should have intervened in the appeal to challenge the dismissal from the case of a party whom they agree should be dismissed from the case? The KANOIVICKIS' interests are patently adverse to CAROLYN HIGDON'S interests, and the KANOIVICKIS enthusiastically agree with the trial judge's finding as to CAROLYN HIGDON. The KANOIVICKIS do

not agree, however, that the Court of Appeals should broaden that limited relief to apply to all participants in the case. In this matter, which involves an $8 million estate, it is extremely unfair to the KANOIVICKIS.

The Court of Appeals' decision in the HIGDON matter (Exhibit 8), demonstrates an oversight by its author of the involvement of the KANOIVICKIS as will contestants. Beginning on page 12 of that opinion, the court presents an accurate summary of Tennessee law on the "in rem" nature of will contest proceedings. This applicant in no way challenges the correctness of that legal analysis. However, the problem with the court's ruling begins in the second paragraph on page 12 of that opinion:

> "As will be discussed later, it was not proper to render a judgment against a party in a

> will contest, the proper judgment being for or against the will, or whether or not a valid will was made by the deceased. A judgment against a proponent of a will could be interpreted as a judgment against the will.
>
> The judgment from which this appeal is prosecuted is not a final, appealable judgment because no disposition is made of the April 8, 1985 will. See T.R.C.P. Rule 54.02 and T.R.A.P. 3a. It is debatable as to whether the partial judgment against the holographic will was properly declared final. Nevertheless, in view of the advanced stage of this appeal, the issues will be considered and resolved as upon extraordinary appeal." (Page 12, Higdon Appeal Judgment, Exhibit 7).

It is apparent, simply stated, that Judge Todd overlooked, in expressing those remarks, the following points: (1) That the motion which led to the appeal asked for relief as to only CAROLYN HIGDON; (2) That the order entered by the trial judge, on the motion, expressly

limited its relief against CAROLYN HIGDON; (3) That the KANOIVICKIS remained as valid contestants in the Circuit Court; and that the KANOIVICKIS have never been afforded any notice that additional relief was being sought; (4) That the "non final" orders were being unilaterally declared "final", with no notice to the KANOIVICKIS; and (5) that the broadening of the relief, to make it applicable to all parties, had the effect of depriving the KANOIVICKIS of an opportunity to present evidence on the issue of testamentary capacity. Again, it must be emphasized that the KANOIVICKIS had no reason to challenge the relief sought against CAROLYN HIGDON, and in fact agreed that she should be estopped from taking a position in the present matter which was contrary to a

position which she had previously taken in other litigation.

5. Reasons the application should be considered: The KANOIVICKIS respectfully insist, pursuant to Rule 11a of the Tennessee Rules of Appellate Procedure, that fairness and due process support this court's review of the procedurally entangled, obviously misunderstood, status of the case. Review is appropriate based upon the provisions of Rule 11a(4) (The need for the exercise of the Supreme Court's supervisory authority). The case is a procedural mess. With no opportunity to present evidence on the issues of testamentary capacity, the KANOIVICKIS have been deprived of their interest in a sizable estate, by an appellate level order which grants relief far beyond what

was asked for, or granted, in the trial court.

6. Summary: This applicant is mindful of the court's rulings in the case of Petty v. Call, 599 S.W.2d 791 (Tenn. 1980) and Mallicot v. Poynter, 772 S.W.2d 681 (Tenn. App. 1986 perm. app. denied) which hold that interested parties may be bound by the in rem results in a will contest, even in the absence of notice of the pendency of the action. However, the present matter presents a very different situation: One in which the KANOIVICKIS were told one thing at the trial level (as to what relief would be requested), and the Court of Appeals, in ruling on the HIGDON summary judgment appeal, vastly broadened the relief with no opportunity for the KANOIVICKIS to be heard on the issues. No appealable point occurred at the trial

level in the HIGDON summary judgment presentation. As previously stated, the KANOIVICKIS agree with the correctness of the trial judge's ruling of the hearing. The broadened relief which appeared in the wording of Judge Todd's decision in HIGDON appeal is now being used as the basis for saying that the KANOIVICKIS are precluded from trying the testamentary capacity issues. The KANOIVICKIS should be afforded an opportunity to present their evidence of testamentary incapacity to a jury.

Respectfully submitted,

s/Wm. Kennerly Burger
Wm. KENNERLY BURGER, BPR #3731
Attorney for Leon and Mauricio Kanoivicki
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P. O. Box 398
Murfreesboro, TN
37133-0398
(615) 896-4154

CERTIFICATE OF SERVICE

A true and exact copy of the foregoing has this date been mailed to the following: J. Stanley Rogers, Attorney at Law, ROGERS, RICHARDSON & DUNCAN, 100 N. Spring Street, Manchester, TN 37355; James H. Henry, II, Attorney at Law, HENRY & McCORD, P. O. Box 538, Tullahoma, TN 37388; Robert L. Huskey, Attorney at Law, P. O. Box 777, Manchester, TN 37355; Michael I. Mossman, Attorney at Law, EISENSTEIN, MOSES AND MOSSMAN, One Church Street, Suite 500, Nashville, TN 37201-1607; William K. Harbison, Attorney at Law, SHERRARD & ROE, 424 Church Street, Suite 2000, Nashville, TN 37219; H. Thomas Parsons, Attorney at Law, 101 W. Main Street, Manchester, TN 37355; George E. Barrett, Attorney at Law, BARRETT, JOHNSTON &

PARSLEY, 217 Second Avenue North, Nashville, TN 37201; this 26th day of August, 1994.

s/Ken Burger
KEN BURGER

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

COFFEE CIRCUIT
NO. 01A01-9309-CV-00396

BETTYE JEAN GREEN, et al,

Plaintiffs/Appellees,

VS.

CAROLYN HIGDON, et al,

Defendants/Appellants.

PETITION TO REHEAR FILED IN BEHALF OF APPELLANTS KANOIVICKI

1. The application for permission to appeal, previously filed by Appellants LEON and MAURICIO KANOIVICKI, was denied by the court by per curiam order filed December 5, 1994. Appellants KANOIVICKI, pursuant to the provisions of Rule 39 of the Rules of Appellate Procedure, respectfully request a rehearing on the issue, and, pursuant to Rule 39(d) would request that the court permit oral

discussion of the unique issues involved, in order to clarify the procedural difficulties which are documented in the record.

2. The points relied upon by the KANOIVICKIS are firmly documented in the trial and appellate record, and constitute a patent due process violation, for which relief is appropriate.

3. The salient points relied upon by the Applicants in asserting their entitlement to a merits hearing, are stated as follows:

> A. In a will contest involving multiple defendants, all served in solemn form, summary judgment is filed by the plaintiffs against one of those defendants (HIGDON) asking for only limited relief as to that single defendant. A copy of the motion, asking for relief only as to HIGDON, is served on the KANOIVICKIS, who are not represented by counsel at that stage, and, as

residents of Argentina, speak only the Spanish language.

B. The trial judge properly enters an order granting the relief requested as to CAROLYN HIGDON (relief which the KANOIVICKIS, even today, feel was appropriate). The record reflects that the trial judge specifically limited the import of the order to Defendant CAROLYN HIGDON, and stated that it had no effect on the other defendants.

C. An appeal is taken by HIGDON's counsel to the Court of Appeals. The KANOIVICKIS in no way participate in the appeal, since they are placed on no notice that it will involve their interests. That appeal is disposed of by entry of an order which affirms the correctness of the trial judge's ruling, but expands the legal effect of the trial judge's ruling by stating that, as an in rem proceeding, the will contest is now concluded as to the will in issue, and remanding the matter to the trial court for further proceedings on a later will. That wording was included in the appellate opinion on the HIGDON appeal, despite the existence of orders in both the appellate record and the trial record which acknowledge that

the pending appeal involve CAROLYN HIGDON, and not otherwise.

D. Subsequent proceedings as to the KANOIVICKIS are resolved by the determination that they are bound by the ruling in the CAROLYN HIGDON appeal, based upon the "in rem" jurisdictional nature of the will contest.

4. Simply stated, at a time when the KANOIVICKIS were before the court as will contestants (having been so recognized by trial court order), they were told that one thing was being sought by the Plaintiff's summary judgment application, and the subsequent orders entered thereon, and another, completely different, result was applied in the appellate decision, without any notice or opportunity to voice an opinion on the merits of the decedent's Alzheimer's condition. The fundamental due process question is this: When the KANOIVICKIS

were served with a motion which asked for limited relief as to CAROLYN HIGDON, and they would have agreed that the relief should have been granted, why should they have been expected to file affidavits on the issue of competency and undue influence? In an estate which involves substantial assets, basic notions of fairness and constitutional due process have been disregarded. An appeal to the Supreme Court of this state is the only means of recourse remaining to the KANOIVIČKIS to correct the apparent oversight in the HIGDON appellate opinion which failed to take into account its procedural impact on the other will contestants.

Respectfully submitted,

s/Wm. Kennerly Burger
Wm. KENNERLY BURGER, BPR #3731
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MOSSMAN, One Church Street, Suite 500, Nashville, TN 37201-1607; William K. Harbison, Attorney at Law, SHERRARD & ROE, 424 Church Street, Suite 2000, Nashville, TN 37219; H. Thomas Parsons, Attorney at Law, 101 W. Main Street, Manchester, TN 37355; George E. Barrett, Attorney at Law, BARRETT, JOHNSTON & PARSLEY, 217 Second Avenue North, Nashville, TN 37201; this 8th day of December, 1994.

s/Ken Burger
KEN BURGER

Citation Rank(R) Database Mode

Not Reported in S.W.2d R 1 OF 4 TN-CS Page
(Cite as: 1992 WL 387342 (Tenn.App.))

SEE COURT OF APPEALS RULES 11 AND 12

ORANGE TEE, INC., Plaintiff-Appellee,

v.

THE CAIN PARTNERSHIP, LTD.,

Defendant-Counter-Claimant-Cross-Claimant

Appellant,

and

Ralph BROWNING, Defendant-Appellee.

03A01-9203CH107.

Court of Appeals of Tennessee,

Eastern Section.

Dec. 31, 1992.

Permission to Appeal
Denied by Supreme Court March 22, 1993.

Rehearing Denied Jan. 19, 1994.

Knox County 03A01-9203-CH-107,

Frederick D. McDonald, Chancellor.

William J. Harbison, Nashville and LARRY E. PARRISH, Memphis, for Appellant.

John P. Valliant, Jr., Knoxville, for appellee Ralph Browning.

Charles W. Burson, Atty. Gen. and Reporter, and John B. Nisbet, III, Asst. Atty. Gen., Nashville, for state.

MEMORANDUM OPINION [FN1]

FN1. The Court of Appeals Rules provide the following:

Rule 10. (b) Memorandum Opinion. The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any

reason in a subsequent unrelated case.

GODDARD, Judge.

*1 This suit, which concerns a 5.71-acre tract of land located in Knox County, originated as one for declaratory judgment and was initiated by Orange Tee, Inc., against Cain Partnership, Ltd., the original lessee, from the owner. Although the interest of various entities in the real estate are convoluted, in essence, which we will treat as in fact, Orange Tee is a sub-lessee of Cain Partnership. The suit was prompted by notice from the Cain Partnership for Orange Tee to "quit the premises" because of the illegal activities being conducted thereon by a remote sub-lessee, Ralph Browning, who operated Mouse's Ear, a night club which featured nude dancing.

Cain Partnership filed a counter-complaint seeking possession of the premises.

The principal issue presented is whether in the absence of a forfeiture clause a lease may be terminated because of a breach of its terms and conditions. Even though the Chancellor found Mr. Browning was in violation of T.C.A. 29-3-101(a)(1), he nevertheless found in favor of Orange Tee on the theory of collateral estoppel because of a finding of the bankruptcy judge, which on appeal was affirmed by the District Judge, that absent a forfeiture clause a lease could not be terminated. The bankruptcy controversy giving rise to the foregoing determination by the Federal Tribunals was between Cain Partnership and Pioneer Investment Services, Inc., the bankrupt, which had been assigned the interest of

Premiere Investment Properties, Inc., which in turn had been assigned the interest of Colonial, a sub-lessee of Cain Partnership.

Cain Partnership appeals, contending inter alia that the judgment rendered by the District Judge had been significantly modified by the 6th Circuit Court of Appeals, rendering the application of collateral estoppel inappropriate.

In our determination of the principal issue, we do not deem it necessary to decide whether the Chancellor was correct in his application of the doctrine of collateral estoppel, but rather choose to answer the ultimate question presented.

The lease from Cain Partnership to Orange Tee contained the following provisions:

1. This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the Lessee.

* * *

3. The Lessee agrees that its use of the leased premises will not violate any statute or ordinance, municipal, state or federal.

As already noted, the lease did not provide for a forfeiture in the event of breach of the provisions of the lease.

We have been cited two cases involving illegal activities. In the first, Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S.W. 364 (1908), the property was leased for a saloon which at the time this lease was executed was a legal activity. Thereafter, by statute the operation of a saloon became illegal. Our Supreme Court held that the

subsequent illegality of the activity contemplated authorized termination at the instance of the lessee. In the other case, Bank of Commerce & Trust Co. v. Burke, 135 Tenn. 19, 185 S.W. 704 (1916), the lease was for the operation of a liquor store which was illegal at the time the lease was executed. Our Supreme Court held under these circumstances where the landlord knew of the contemplated illegal activity he could not recover rents. Neither of these cases, in our view, provide any assistance in resolving the present one.

*2 We are, however, aware of three cases which we believe are dispositive. All three hold that in the absence of a termination clause, failure to pay rent does not result in forfeiture. Barnett v. Dooley, 186 Tenn. 611, 212 S.W.2d

598 (1948); Smith v. Holt, 29 Tenn. App. 31, 193 S.W.2d 100 (1945); Greene v. Donnell, 11 Tenn.App. 366 (1930).

Given the fact that generally the most important covenant that a lessee can make to the lessor is the payment of rent, we conclude that a fortiori the rule would also apply to less significant covenants.

Moreover, we note that our courts are following the general rule, which is set out in 49 Am.Jur.2d., Landlord and Tenant s 1020, wherein the authors with appropriate citations state the following:

s 1020. Generally.

A forfeiture of the leasehold may result by virtue of the common law, as in the case of forfeiture for disclaimer of title, by virtue of a statutory

provision, or by virtue of some clause in the lease providing for forfeiture in case of breach of covenant or condition. In the absence, however, of an express stipulation or proviso to that effect, the general rule is that the breach of the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term, and that the lessor's remedy is by way of a claim for damages.

In the absence of a stipulation for a forfeiture, a lessee does not forfeit his term by the nonpayment of rent or of taxes which he has covenanted to pay. Nor will a forfeiture be decreed because of a violation of a covenant not to sublet or assign, or even because of an illegal use of the demised premise,
although any of such things may by the terms of the lease be made grounds of

forfeiture....

Cain Partnership further argues that even if the foregoing is a correct statement of Tennessee case law that T.C.A. 29-18-102(b), enacted in 1979, overrules it. This Section provides as follows:

29-18-102. Forcible entry and detainer defined--Where action does not lie.--

(a) ...

(b) No action for forcible entry and detainer shall lie against any tenant who has paid all rent due for their current occupancy of the premises and who are not in violation of any law nor otherwise in breach of their written lease, but this subsection shall not apply in any manner to farm property, nor shall the provisions of this subsection be construed to alter or amend any valid

lease agreement in effect on May 31, 1979.

Cain Partnership argues this Section by providing when no action will lie implicitly authorizes that such an action, as to tenants who have not paid their rent, are in violation of any law, or are in breach of their lease.

We believe that had the Legislature intended to dramatically alter what we conceive to be settled law, it would have done so in unmistakable terms rather than by inference.

Moreover, we are somewhat puzzled by Sub-section (b) in that it speaks of a forcible entry and then of a tenant who has paid all rents. Certainly it would be the rare situation where one has forcibly entered and detained premises and then begins paying rent. In this regard, we are aware of the argument of

Cain Partnership that the terms "forcible entry and detainer" and "unlawful detainer" are used interchangeably in our statutes and reported opinions. It may very well be that the Legislature intended for Subsection (b) to address unlawful detainer rather than forcible entry and detainer. However, we are disinclined to rewrite the Statute to remedy its apparent paradox.

*3 Moreover, it appears that Cain Partnership's reliance on the foregoing Code Section was an after thought, as the Code Section is not mentioned in its counter-complaint nor in argument of counsel, at the conclusion of Orange Tee's proof, nor after all the proof had been received. The first mention we find is in Orange Tee's response to Cain Partnership's proposed findings of fact

and conclusions of law, which is not part of the record.

Before leaving this point, we acknowledge the authority cited by Cain Partnership to the contrary. Restatement of Property 2d., s 12.5; Cansler American Law of Property, ss 3.39, 3.43 and 3.44. However, it is not the prerogative of an intermediate appellate court to change what, as we have said before, we perceive to be settled law.

Although our foregoing disposition makes it unnecessary to address the other issues raised, we deem it appropriate to briefly address two of them. Contrary to the assertion of Orange Tee, we find T.C.A. 29-3-101(a)(1)--as elided by the Federal District Court [FN2] in Airways Theater, Inc. v. Canale, 366 F.Supp. 343 (W.D.Tenn.1973), and accepted by this Court in State

ex rel. Webster v. Daugherty, 530 S.W.2d 81 (Tenn.App.1975)--to be constitutional.

FN2. " 'Nuisance' means that which is declared to be such by other statutes and in addition thereto means any place in or upon which ... assignation, prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, ... quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted, and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose."

We further find the evidence preponderates in favor of the Chancellor's finding that Mr. Browning,

in the operation of Mouse's Ear, violated T.C.A. 29-3-101(a)(1).

For the foregoing reasons the Trial Court is affirmed and the cause remanded for such further proceedings, if any, as may be necessary and collection of costs below. Costs of appeal are adjudged one-half against Cain Partnership and its surety and one-half against Orange Tee.

SANDERS, P.J. (E.S.), concurs.

FRANKS, J., concurs with attached concurring opinion.

FRANKS, Judge, concurring.

I agree with the majority's opinion, to the extent it addresses the determinative issue on appeal. I do not participate in the gratuitous comments on the constitutional issue. It is generally the policy of all courts to refrain from reaching constitutional issues unless absolutely necessary. Moreover, the

majority's comments are rendered gratuitous by the fact that this is a memorandum opinion, which may be cited for no purpose in any other case.

ORDER ON PETITION TO REHEAR

PER CURIAM

Appellant has filed a petition to rehear denial of a T.R.A.P. 11 application for permission to appeal. There is no provision in T.R.A.P. 11 authorizing a petition to rehear denial of an application for permission to appeal. In the alternative petitioner has requested the Court to direct publication of the Court of Appeals opinion in this case. The opinion of the Court of Appeals is designated a Memorandum Opinion under the provisions of Rule 10(b) of that court and is not subject to publication or citation for any reason in a subsequent unrelated case.

For the foregoing reasons as well as the Courts conclusion that the petition is otherwise without merit the application is respectfully denied.

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Citation Rank(R) Database Mode
Not Reported in S.W.2d R 2 OF 4
TN-CS Page
(Cite as: 1992 WL 332089 (Tenn.))

NOTICE: THIS OPINION IS DESIGNATED AS NOT FOR PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY TENN. S.CT. RULE 4.

Edward N. BASDEN, Appellant,

v.

Robert D. LAWSON, in his official capacity as Commissioner of the Tennessee Department of Safety, Appellee.

Supreme Court of Tennessee, at Nashville.

Nov. 9, 1992.

Davidson Chancery, No. A01-9111-CH-00435.

ORDER

PER CURIAM.

*1 A respectful petition to rehear the denial of a T.R.A.P. 11 application has been filed by the appellee, Commissioner of the Department of Safety, citing as authority T.R.A.P. 39(a).

T.R.A.P. 39 contemplates a petition to rehear a final judgment and is

inappropriate as a vehicle to reconsider a denial of a Rule 11 application.

The petition to rehear is dismissed.

We clarify our prior judgment of denial of the Rule 11 application by noting that we agree with the Court of Appeals finding that the State failed to satisfy the requirements of T.C.A. s 53-11-2201(d)(2) at the hearing before the Administrative Judge, therefore the further analysis by that court was not necessary to its decision and we concur in results only.

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